SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 299

THE UNITED STATES, PETITIONER

vs.

GERLACH LIVE STOCK COMPANY

No. 300

THE UNITED STATES, PETITIONER

vs.

J. SHELDON POTTER

No. 301

THE UNITED STATES, PETITIONER

vs.

MARTIN ERRECA

No. 302

THE UNITED STATES, PETITIONER

vs.

JAMES J. STEVINSON (a Corporation)

No. 303

THE UNITED STATES, PETITIONER

vs.

ARCHIBALD J. STEVINSON

No. 304

THE UNITED STATES, PETITIONER

vs.

3-H SECURITIES COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 46009

GERLACH LIVE STOCK COMPANY (a corporation),
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Petition in No. 46009—Filed October 30, 1943.

To the Honorable, the Court of Claims of the United States:

Now comes the plaintiff above named, and complaining of the defendant above named alleges and shows to the court:

I.

2 On and prior to the 20th day of June, 1935, Miller & Lux Incorporated, a corporation, was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced, State of California, described as follows:

All of Section 16; north half, and north half of southeast quarter of Section 21; north half, north half of south half, and southeast quarter of southeast quarter of Section 22; east half of northeast quarter of Section 27; east half of northeast quarter of Section 27; all in Township 8 South, Range 11 East, M. D. B. & M., containing 1640 acres.

II.

On said 20th day of June, 1935, said Miller & Lux Incorporated duly conveyed said land to one Edward P. Waltz, subject to certain "exceptions and reservations" hereinafter set forth, and he remained the owner of said land together with the tenements, hereditaments, and appurtenances thereunto belonging, until the 25th day of February, 1937, on which day he conveyed the same to Gerlach Live Stock Company, a corporation, and it remained the owner of said property, together with the tenements, hereditaments and appurtenances thereunto belonging, except for the taking by defendant as hereinafter

alleged, until the 9th day of May, 1942, when it duly conveyed the same to one C. A. Crane.

III.

Said C. A. Crane remained the owner of said property together with the tenements, hereditaments and appurtenances thereunto belonging, except for the taking by defendant as hereinafter alleged, until May 14, 1942, when he conveyed the same to Strathearn Bros., a co-partnership composed of R. P. Strathearn, J. L. Strathearn, George P. Strathearn and David L. Strathearn, and they ever since have been the owners of said property together with its tenements, hereditaments and appurtenances, except for the said taking by defendant.

IV.

The San Joaquin is a natural watercourse arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as "Friant" in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as "Mendota", and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

V.

All of said lands lie along and border upon branch channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and its successors are, but for the taking by defendant hereinafter alleged, entitled to all rights of riparian owners with respect thereto, including the right to the use of the waters of the said river for irrigation of said land, for the watering of livestock thereon and for domestic purposes thereon, subject only to the "reservations and exceptions" hereinafter set forth.

VI.

On or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said river situated to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the

other leading south from said reservior through the counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said river which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VII.

At and prior to any of the times herein mentioned large amounts of water of the San Joaquin River
5 had been either appropriated by other persons, or used by riparian owners on said river for the irrigation of pasture lands, between the location of Friant Dam and the lands of plaintiff, and the plan of the defendant also contemplated the acquisition by purchase or condemnation of all of the rights of such persons in and to the waters of the San Joaquin River and the storage, diversion and use of said water by the defendant by means of its said reservoir and canals at Friant. The use and appropriation of said water of the San Joaquin River by the various persons so using and appropriating the same above lands of plaintiff resulted in said water flowing to the lands of plaintiff when not used by such appropriators or users and resulted in the retention of said water in the land so irrigated and the ultimate return of large portions thereof to the said San Joaquin River and the branch channels thereof above the lands of plaintiff; and the removal of said water from the lands upon which such water had theretofore been appropriated and used was detrimental to plaintiff's land and water rights.

VIII.

At and prior to any of the times herein mentioned large amounts of water flowed in the San Joaquin River in addition to the amounts theretofore appropriated from said river by other persons and in addition to the amount customarily used by riparian owners above the said lands of plaintiff, and in addition to the reasonable amount necessary for use upon land riparian to said river
6 situated above said lands of plaintiff, and said water from time immemorial had flowed down said river and through said branch channels of said river and by,

through, over and upon said land of plaintiff and would naturally continue to so flow except for the taking by defendant, and the plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of said plaintiff or said lands of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

IX.

The said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevented the same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

7

X.

The said defendant through its said Bureau of Reclamation has heretofore investigated the damage which resulted to plaintiff and its lands and the compensation to which plaintiff is entitled by reason of the taking aforesaid and has concluded and found that the said lands and water rights have been damaged in the sum of $14,760.00 by the said taking, and plaintiff alleges that in fact the said rights which plaintiff owned in the said lands on said 20th day of October, 1941, have been damaged in said sum of $14,760.00 by the taking aforesaid as against the rights of plaintiff in said lands, and said sum together with a sum equal to interest thereon from the date of taking to date of payment at 7 per cent per annum constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which the defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

XI.

The defendant has not paid said sum or any part thereof. The said payment has not been made for the following reasons:

Said deed from Miller & Lux Incorporated dated June 20, 1935, contained the following provision referred to therein as "exceptions or reservations":

"This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the grantor, its successors, subsidiary and affiliated companies (including mutual water companies in which the grantor owns stock), whether such water rights be riparian, appropriative or prescriptive, to the end that the grantor, its successors, subsidiary and affiliated companies, may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hinderance from the grantee, his heirs and assigns. This covenant and condition shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor, its successors, subsidiary and affiliated companies, against the grantee, his heirs and assigns to the extent herein provided."

At the time of making said deed Miller & Lux Incorporated was the owner of large tracts of land riparian and non-riparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River, and it also theretofore stored and impounded said waters behind dams across the said river and its branch channels, and other persons had with the consent of said Miller & Lux Incorporated stored portions of the waters of said river in the Sierra Nevada Mountains for hydro-electric power and returned the same to the river channel far above the lands of Miller & Lux Incorporated; and the true meaning of said reservation or exception was that said Miller & Lux Incorporated reserved the rights which it then had to store, impound, divert and use all or any part of the water flowing in the San Joaquin River and its tributaries for use on the land so owned by it, and to continue to permit such storage for power purposes. At that time said Miller & Lux Incorporated was subdividing its land for sale in small parcels and intended to provide for the future irrigation of said land with the rights which it or its subsidiary and affiliated companies, including mutual water companies, then owned or to which it might assign said rights, and for that reason and purpose it likewise reserved the right to so assign said rights to any such subsidiary or affiliated

companies, including mutual water companies, and the right of its assignees to continue to exercise such rights. At the time of making said deed said Miller & Lux Incorporated owned certain lands riparian to the San Joaquin River situated above the lands of the plaintiff and also had made certain appropriations of water of the river on lands situated above the lands of the plaintiff, but it owned no right to store any water of said river at Friant, nor did it own any right to store any water of said river elsewhere, except so far as it had theretofore stored and impounded said water behind dams on its lands, or permitted such storage for power purposes, nor did it own any right to appropriate or divert any of the water of the San Joaquin River at Friant or to store the same in the said Friant Reservoir or to divert the same into either of the two canals so to be constructed by the defendant, nor did it own any right to transfer or change the place of diversion or use of the waters which it had theretofore diverted and used to the said Friant Reservoir or the canals leading therefrom, so as to interfere with the flow of said water to plaintiff's lands when not used by said Miller & Lux Incorporated or with the return thereof to the lands of plaintiff when so used, nor did it own any right to transfer or change the place of diversion or use of the water which had theretofore been used by others from the said San Joaquin River on lands above the lands of plaintiff so as to store the same in the said Friant Reservoir and so as to divert the same therefrom, and thus prevent the same from flowing or returning to the lands of the plaintiff, nor did it have any right in or to the surplus water of said river over and above the water theretofore appropriated by it or used and reasonably necessary for use on its lands, and none of said rights was conveyed by the plaintiff or its predecessors to the said Miller & Lux Incorporated, nor was any of said rights by said deed made an easement in said land or reserved or excepted from the rights of plaintiff in said land, nor did the said Miller & Lux Incorporated thereby acquire or own a right to all of the water of the San Joaquin River or a right to prevent the plaintiff from using said water on its riparian lands, and the said exceptions and reservations in no way authorized said Miller & Lux Incorporated to burden the said land by any taking of water by defendant, and the damages so inflicted upon said lands and upon plaintiff were inflicted by reason of interference with rights owned by the said plaintiff, notwithstanding said reservations and exceptions.

XII.

By reason of the premises the defendant, acting through the United States Bureau of Reclamation,
11 was uncertain as to whether said compensation should be paid to the plaintiff herein or to the said Miller & Lux Incorporated and for that reason the said defendant, acting through the United States Bureau of Reclamation, deposited said compensation in escrow under the condition that the same should be paid to Miller & Lux Incorporated unless within a period of six years after said taking a judgment should be recovered by plaintiff in the Court of Claims of the United States for damages or compensation for such taking. Plaintiff has endeavored to settle and adjust its claim herein with the Bureau of Reclamation, but for the reason aforesaid has been unable to do so.

XIII.

Thereafter and on the 18th day of March, 1943, said Gerlach Live Stock Company, a corporation, sold, assigned, transferred, and set over to said Strathearn Bros. its claim, demand, right and cause of action against the United States of America for compensation for the taking, as hereinafter alleged, by defendant through the Bureau of Reclamation, Department of the Interior of the United States of America, of the waters of the San Joaquin River for storage in and diversion at Friant Dam as against the right of said Gerlach Live Stock Company as the owner of said land. The consideration for said transfer was the payment of the sum of Ten Dollars ($10) by Strathearn Bros. to said Gerlach Live Stock Company for said claim.

There has been no assignment or transfer of the
12 claim herein or any part thereof other than the transfer herein set forth. The said plaintiff brings this action for the use and benefit of said Strathearn Bros., assignees.

XIV.

The plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets for the use and benefit of said Strathearn Bros.

XV.

The plaintiff herein and all other owners of the claim made herein have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government and plaintiff believes the facts as stated in this petition to be true.

XVI.

The following Acts of Congress and Acts of the Executive Department are relied upon by the plaintiff:

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and containing recommendations as to Federal participation and being a report to the House Committee on rivers and harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this report was laid before the committee together with various acts then before Congress as to the extent and form of federal participation.

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L. p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000.00 to the project.

4. The Act of Congress approved August 30, 1935 (49 U.S.S.A.L. pp. 1028-1038), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes", and authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L. p. 1597) entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which Act at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project" appropriated $6,900,000.00 for the continuance of the project.

7. The Act of Congress dated August 9, 1937 (50 U.S.S.A.L. pp. 564-597) entitled "An Act making appropriation for the Department of Interior for the fiscal year ending June 30, 1938, and for other purposes", by which act $12,500,000.00 was appropriated for the Central Valley Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S.A.L. pp. 844-850) entitled "An Act authorizing the construction, repair and preservation of certain public works

on rivers and harbors, and for other purposes", which act appropriated $12,000,000.00 to the Central Valley Project.

9. The Act of Congress of May 9, 1938 (52 U.S.S.A.L. p. 291) which act appropriated $9,000,000.00 to the Central Valley Project.

10. The Act of Congress of May 10, 1939 (53 U.S.S.A.L. pp. 685-719) which act, at page 719, appropriated $10,000,000.00 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L. p. 87), appropriating $5,000,000.00 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U. S. S.A.L. pp. 406, 438), appropriating $23,000,000.00 for the Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S. S.A.L. p. 1200), reauthorizing the Project.

15 14. The Act of Congress of June 28, 1941 (55 U.S.S.A.L. p. 336), appropriating $34,750,000.00 for the Central Valley Project.

15. The Act of Congress of July 30, 1941 (55 U.S.S.A.L. p. 612), in aid of the construction of the Central Valley Project and granting to the United States title of Indians in land embraced in the Project.

16. The Act of Congress of December 17, 1941 (55 U.S. S.A.L. p. 827), appropriating $3,000,000.00 for the Project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the Project.

WHEREFORE, plaintiff prays that plaintiff, for the use and benefit of said Strathearn Bros., recover judgment against said defendant for the sum of $14,760.00, together with a sum equal to interest at seven per cent (7%) per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, San Francisco, California, October 18, 1943.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

16 *Duly sworn to by Louis G. Baldwin.*
Jurat omitted in printing. (All in italics.)

17 *Proceedings following petition in case No. 46009*

On December 9, 1943, a general traverse was filed to the petition in case No. 46009.

On February 17, 1944, on motion made therefor and allowed by the court, the general traverse was withdrawn and defendant's demurrer to petition was filed.

On April 3, 1944, the case was argued and submitted on defendant's demurrer to petition.

On October 2, 1944, defendant's demurrer was overruled, with opinion by Judge Whitaker.

On November 11, 1944, a general traverse was filed which is as follows:

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) FRANCIS M. SHEA,
Assistant Attorney General.

P. M. C.
N. A. C.
E. E. E.

19 *Intervening Petition of Miller & Lux Incorporated—Filed February 12, 1945*

To the Honorable, the Court of Claims of the United States:

Now comes Miller & Lux Incorporated and appears herein and files its intervening petition pursuant to the order of the above court dated the 13th day of December, 1944, and states:

20 I.

That during all of the times mentioned in plaintiff's petition, and long prior thereto, Miller & Lux Incorporated, hereinafter referred to as intervener, was the owner of a large acreage of land in the Counties of Madero, Fresno, Merced and Stanislaus, State of California, a portion of which was contiguous to the San Joaquin River, its branches and sloughs, and was riparian thereto, and a portion of which was not riparian to said river or sloughs; that of said riparian and non-riparian lands a portion thereof was suitable for the growing of crops and was irrigated by appropriations of water from said river, and the water and water rights so used in such irrigation were and are commonly referred to as crop land water rights; that the remainder of said lands was not suitable for the growing of crops, but was suitable only for the growing of wild grasses for pasturage purposes; that of said lands so used for pasturage purposes a portion was irrigated by appropriations of water from said river, and a portion suitably located was irrigated by overflow at high stages of the river flow, and the portion not properly located in relation to the river flow received no irrigation whatsoever; that such pasture

lands as were irrigated by appropriations were and are commonly referred to as grass lands, and the water rights appurtenant thereto were and are known as grass land water rights; that such pasture lands as were irrigated by overflow from the said river or its sloughs, or which were not irrigated but bordered on the said river or sloughs, were known and referred to as riparian lands; that
21 the lands described in paragraph I of plaintiff's petition were riparian in character by reason of the fact that the patented parcel comprising said lands bordered upon a slough which took out of the San Joaquin River, and none of said lands bordered upon said river.

II.

The commencing in the year 1906 and continuing to the year 1920 intervener entered into contracts with the Southern California Edison Company and the San Joaquin Light and Power Company, and/or their predecessors, for the storage of water on said river so that there would be a more dependable supply of water for the irrigation of said crop lands; and intervener also organized mutual water companies for the more efficient and expeditious distribution of water to said crop lands.

III.

That about the year 1920 intervener commenced to negotiate with the Madera Irrigation District for the sale of its said water rights, exce[illegible] the water rights appurtenant to its said crop lands, which negotiations were carried on until the formation of the San Joaquin River Water Storage District in or about the year 1924; that the project contemplated by said Water Storage District included the project contemplated by said Irrigation District and negotiations for the sale of said water rights were continued with said Water Storage District until said District was dissolved in the year 1929; that shortly thereafter intervener
22 commenced negotiations for the sale of its said water rights to the Fresno Irrigation District and said negotiations were continued up to the time the United States, through the Department of the Interior, opened negotiations for the purchase of said water rights; that no part of said pasture lands of intervener was included within the boundaries of any of the aforementioned districts; that that it was the plan and purpose of said districts to provide water for the irrigation of lands within the boundaries of each and thus deprive intervener's pasture lands of any water for irrigation purposes; that a large part of the lands within the boundaries of each of said districts was located outside of the watershed of the San Joaquin River.

IV.

That in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands; that by means of newspaper advertisements, pamphlets, real estate brokers, and such other means as are usually employed in sales campaigns of this nature, intervener offered its lands to the public in two general classifications, lands with water rights, and lands without water rights; that the lands with water rights were crop lands located within the boundaries of the mutual water companies heretofore referred to, and the lands without water rights were the aforesaid pasture lands used for the production of wild grasses, which as aforestated, include the lands described in paragraph I of plaintiff's petition; that at all times a sharp differential in selling price was maintained by intervener as to said two
23 classifications of its lands offered for sale, the pasture lands without water selling at a greatly reduced figure.

V.

That during said sales campaign the land referred to in paragraph I of plaintiff's petition was sold by intervener to Ed. P. Waltz on the 12th day of April, 1927, under a ten-year installment contract, which contained, among other things, the following exception and reservation:

"*The following property and property rights are* excepted and reserved, to wit:

"All water rights, if any, whether riparian, appropriative or prescriptive, including the right to receive water released from storage reservoirs on the San Joaquin River."

That a similar exception and reservation was incorporated in substantially all contracts for the sale of intervener's pasture lands; that this exception and reservation was made for the sole purpose of depriving said land of any water rights as between intervener, its successors and assigns, and said Ed. P. Waltz and his heirs and assigns, thus enabling intervener to consummate the sale of all water and water rights appurtenant to said land; that at the time of said sale it was the opinion of counsel for intervener, as well as the opinion of many other lawyers specializing in water law, that an exception and reservation such as contained in said deed to Ed. P. Waltz created a waiver or estoppel as between grantor and grantee, and their successors
24 and assigns, but did not affect the riparian rights of the land so conveyed in so far as third parties not in privity with the grantor were concerned; that subsequent to said sale to Ed. P. Waltz, to wit, in the year 1932, the Superior Court of the State of California, in and for the

County of Fresno, in that certain action entitled Miller & Lux Incorporated v. Madera Irrigation District, held that such an exception and reservation, if carried into a deed, would completely extinguish the riparian right of the land so conveyed, and to avoid such a result, which was never intended by intervener, and to permit the use of water on said land so conveyed, as against all parties other than intervener, its successors and assigns, intervener in its aforesaid deed to Ed. P. Waltz, executed on June 20, 1935 upon completion of all payments due under his contract, substituted for the exception and reservation clause which appeared in the contract, and which is above quoted, the clause quoted in paragraph XI of plaintiff's petition herein; and it was provided in the reservation so used in said deed that intervener and its subsidiary and affiliated companies "may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs and assigns", and the effect of this language was and it was intended to be to entirely deprive said lands so conveyed of any water rights whatsoever, or any rights in and to the waters of said river of any nature or kind as against intervener, its successors and assigns.

25

VI.

That negotiations for the sale of said grass land water rights to the United States, hereinabove referred to, were consummated on the 27th day of July, 1939, at which time the contract for the sale of said water was made and entered into between intervener and its subsidiary company, the Gravelly Ford Canal Company, and the United States, and under the terms of this contract all the right, title and interest of intervener in and to the waters of the San Joaquin River, except such waters as were reserved for said crop lands, were sold and assigned to the United States for storage at Friant reservoir, a unit of the Central Valley project of the Department of the Interior, and for use as provided by said project. That subsequently, on the 14th day of September, 1939, as provided for in said contract, intervener and said Gravelly Ford Canal Company executed a deed of its interest in said waters to the United States.

VII.

That said contract provided that certain moneys should be paid unconditionally to intervener, and certain other moneys, to wit, $511,350.00, should be placed in escrow to be disposed of as hereinafter set forth. That there was

nexed to said contract, marked Exhibit "B", a map show-
g the grass lands and riparian lands affected by said con-
act, which included the lands referred to in plaintiff's peti-
n herein, and the contract provided that:

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit 'B', are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit 'B', are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands, and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; PROVIDED, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities."

That in accordance with the foregoing provisions of said contract the sum of $511,350.00 was placed in escrow with The Bank of California, N. A., in San Francisco, California, and said sum and/or investments in United States of America bonds and notes made therefrom are now on deposit in said escrow. That the plaintiff is not entitled to use on the lands described in its said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

VIII.

That intervener further alleges that the storage of water by the United States as set forth in plaintiff's petition does not constitute a taking within the meaning of the fifth amendment to the Constitution of the United States, and denies generally each and every allegation of plaintiff's petition, and alleges that the land referred to in
28 plaintiff's petition has not been and will not be damaged in the sum of $14,760.00, or any other sum, by reason of said storage of water.

IX.

That intervener has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

WHEREFORE, intervener prays that plaintiff be denied any relief under its said petition.

Dated, San Francisco, California,
January 29, 1945.

J. E. WOOLLEY,
Attorney for Intervener.

29 *Duly sworn to by F. L. Humphrey.*
Jurat omitted in printing. (All in italics.)

31 *Answer of Plaintiff to Intervening Petition of Miller & Lux Incorporated—Filed March 12, 1945*

Now comes the plaintiff and answering the intervening petition of Miller & Lux Incorporated, admits, alleges and denies as follows:

I.

Answering Paragraph IV of said petition, it denies all of the allegations thereof except that it admits and alleges that in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands, but

32 denies that by any means it offered its lands to the public in two general classifications, lands with water rights, and lands without water rights, but on the contrary alleges that it entered into numerous different kinds of contracts with numerous and different provisions in regard to water rights. Plaintiff denies that the lands with water rights were crop lands located within the boundaries of the mutual water companies referred to, but on the contrary alleges that much of the lands which were crop lands and within the boundaries of said mutual water companies were sold with limited water rights, and it denies that the lands without water rights, used for the production of wild grasses, include the lands described in plaintiff's petition, and on the contrary alleges that the pasture lands were sold with the water rights that were granted therewith and were a part thereof and which were not reserved and excepted from such grant. Plaintiff admits that there was a sharp differential in selling price between crop lands and pasture lands, but it alleges that the price depended on the character of water right retained by said lands, and that the matter as to what water should go with the land was in all cases a matter of negotiation between the seller and the purchaser.

II.

Answering Paragraph V of said petition, plaintiff denies that the exception contained in the said contract with Ed. P. Waltz, dated the 12th of April, 1927, was made for the sole purpose of depriving said land of any water rights as between intervener and its successors and assigns

33 and Ed. P. Waltz, and on the contrary alleges that the effect of the said reservation was to except all water rights, and it denies that the said deed contained a different reservation in order to permit the use of water on said land as against all parties other than intervener, its successors and assigns, but on the contrary that the purpose of said change was to permit the owner of said land to use any water thereon, both against the intervener and any other person, other than the water expressly reserved thereby, and it denies that the effect of the language there used was or was intended to be to entirely deprive said land so conveyed of any water rights whatsoever or any rights in and to the waters of said River of any nature or kind, as against intervener, its successors and assigns, and on the contrary plaintiff alleges that the effect of the said reservation was as stated in the petition of plaintiff herein.

III.

Answering Paragraph VII of said petition, plaintiff denies that it is not entitled to use on the lands described

in said petition any water which the United States of America, pursuant to the contract or deed mentioned therein, or otherwise, has stored or diverted, or any water which said United States hereafter proposes to store and divert, and on the contrary it alleges that it is entitled to use on said lands a reasonable quantity of the waters of said River which are set forth and described in its petition herein.

34 IV.

It denies all of the allegations of Paragraph VIII of said petition.

V.

Further answering said petition, plaintiff alleges that the escrow referred to therein was made for the benefit of plaintiff and in law enures to its benefit to the extent provided by said agreement creating said escrow.

WHEREFORE, plaintiff prays that intervener take nothing by its intervention, and that plaintiff recover judgment as prayed for in its petition, and that it be further adjudged that plaintiff is entitled to recover the compensation adjudged to it herein from the escrow referred to in said intervention to the extent provided by said agreement creating said escrow.

Dated, San Francisco, California,
March 7, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

35 State of California
City and County of San Francisco.—ss.

Edward F. Treadwell, being first duly sworn, deposes and says: That he is the attorney for plaintiff in the above entitled action and makes this verification on its behalf; that he has read the foregoing answer and knows the contents thereof; that the facts therein stated are true to the best of his knowledge and belief; that the sources of his knowledge and belief are that he personally knows the truth as to all of the facts alleged in the intervening petition and in the answer thereto.

EDWARD F. TREADWELL.

Subscribed and sworn to before me this 7th day of March, 1945.

(Seal) LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

37 In the Court of Claims of the United States

No. 46244

MARTIN ERRECA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Petition in No. 46244—Filed October 26, 1944

To the Honorable, the Court of Claims of the United States:

Now comes the plaintiff above named, and complaining of the defendant above named, alleges and shows to the court:

I.

By a certain deed in writing dated October 20, 1937, Miller & Lux Incorporated, a corporation, which was then the owner of the land hereafter described, conveyed to plaintiff subject to certain "exceptions and reservations" 38 hereinafter set forth, all that certain lot, piece and parcel of land, situate, lying and being in the County of Merced, State of California, and more particularly described as follows:

Beginning at the Southwest corner of Swamp and Overflow Survey 300 in Township 9 South, Range 12 East, M. D. B. & M., thence North 89° 25' East 765.60 feet to the northeast corner of Swamp and Overflow Survey 136 in aforesaid Township and Range, thence along the east line of Swamp and Overflow Survey 136 South 2701.60 feet, thence down and along the right bank of the San Joaquin River South 43° 16' West 115.60 feet, South 25° 02' West 322.00 feet, South 43° 51' West 246.00 feet, South 58° 34' West 370.00 feet, South 66° 26' West 479.35 feet, South 56° 36' West 150.00 feet, South 36° 42' West 645.00 feet, South 43° 45' West 405.00 feet, South 31° 14' West 180.00 feet, South 53° 59' West 55.00 feet, North 85° 24' West 90.00 feet, North 59° 54' West 206.00 feet and North 32° 58' West 219.00 feet, thence leaving river and running along the southerly right of way line of County Road North 41° 56' East 349.75 feet, thence along the arc of a curve to the right of radius 2262.00 feet, a distance of 325.70 feet, thence North 50° 11' East 1658.28 feet, thence leaving road North 1° 07' West 2871.50 feet to the point of beginning, excepting therefrom a portion of a sixty foot County Road, the center line of said portion of County Road being described as follows: Beginning at

a point which bears South 1° 07′ East 2833.06 feet from the southwest corner of aforesaid Swamp and Overflow Survey 300, thence North 50° 11′ East 924.72 feet to the east line of aforesaid Swamp and Overflow Survey 136. Total acreage, exclusive of exception, 71.85 acres, more or less.

39

II.

At all times thereafter said Martin Erreca was the owner of said land and has at all said times been in the possession and entitled to the possession of said land.

III.

The San Joaquin River is a natural watercourse arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as "Friant" in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as "Mendota" and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

IV.

All of said land lies along and borders upon channels of the said San Joaquin River and is riparian thereto, and the owner of said land, subject to said "exceptions and reservations", was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of a riparian owner with respect thereto, including the right to the use of the waters of the said river for irrigation of said land, for the watering of livestock thereon and for domestic purposes thereon.

V.

On or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department
40 of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said river situated to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the other leading from said reservoir south through the counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or taking, and the storage, diversion and use by the United States of America through the said Bureau

of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said river which customarily flowed by, through, over and upon the land of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VI.

At and prior to any of the times herein mentioned large amounts of water of the San Joaquin River had been either appropriated by other persons, or used by riparian owners on said river for the irrigation of pasture lands, between the location of Friant Reservoir and the land of plaintiff, and the plan of the defendant also contemplated the acquisition by purchase or condemnation of all of the rights of
41 such persons in and to the waters of the San Joaquin River and the storage, diversion and use of said water by the defendant by means of its said reservoir and canals at Friant. The use and appropriation of said water of the San Joaquin River by the various persons so using and appropriating the same above the lands of plaintiff resulted in said water flowing to the lands of plaintiff when not used by such appropriators and resulted in the retention of said water in the land so irrigated and the ultimate return of large portions thereof to the said San Joaquin River and said channels thereof above the land of plaintiff, and the plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of plaintiff or said land of plaintiff in and to said waters, and in and to the use thereof by the defendant by means of its said reservoir and canals at Friant.

VII.

At and prior to any of the times herein mentioned large amounts of water flowed in the San Joaquin River in addition to the amounts theretofore appropriated from said river by other persons and in addition to the amount customarily used by riparian owners above the said land of plaintiff, and in addition to the reasonable amount necessary for use upon land riparian to said river situated above said land of plaintiff, and said water from time immemorial had flowed down said river and through said channels of said river and by, through, over and upon said land of
42 plaintiff and would naturally continue to so flow except for the taking by defendant, and the plans of said

defendant contemplated acquisition by purchase or condemnation by defendant of all the rights of said plaintiff or said land of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

VIII.

The said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevent the same from flowing by, through, over and upon the land of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

IX.

The said defendant through its said Bureau of Reclamation has heretofore investigated the damage which has resulted to plaintiff and his lands by reason of the
43 taking aforesaid and has concluded and found that the said lands have been damaged in the sum of $646.65 by the said taking, and plaintiff alleges that in fact the said rights of plaintiff in the said land and in the waters of the San Joaquin River have been damaged in the sum of $2874.00 by the taking aforesaid as against the rights of plaintiff in said land and water and said sum together with an amount equal to interest thereon from the date of taking to the date of payment at seven per cent (7%) per annum constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which the defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

X.

The defendant has not paid said sum or any part thereof. The said payment has not been made for the following reasons:

Said deed dated October 20, 1937, contained the following provision referred to therein as "Exceptions or reservations":

"This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor, its successors, subsidiary and affiliated companies (including mutual water companies in which the Grantor owns stock), whether such water rights be riparian, appropriative or prescriptive, to the end that the Grantor, its successors, subsidiary and affiliated companies, may use, enjoy and transfer said water rights, including the right to con-
44 tract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, its successors, subsidiary and affiliated companies, against the Grantee, his heirs and assigns, to the extent herein provided."

At the time of the execution and delivery of said deed, Miller & Lux Inc. was the owner of large tracts of land riparian and non-riparian to the San Joaquin River and its tributaries, which it had theretofore irrigated with the waters of the San Joaquin River either personally or through subsidiaries and affiliated companies, including mutual water companies in which it owned stock, and it had also entered into certain contracts with other persons under which it consented that certain portions of the waters of the said River might be stored on the upper reaches of said River and used for hydroelectric power and returned to the river channel far above the lands of Miller & Lux Inc., and the true meaning of said reservation and exception was that said Miller & Lux Inc. reserved the water rights which it then owned, including the right to continue said storage on the upper reaches of said River. At the time of making said deed said Miller & Lux Incorporated owned certain lands riparian to the San Joaquin River situated above the lands of the plaintiff and also had made certain appropriations of water of the river on lands situated above the lands
45 of the plaintiff, but it owned no right to store any water of said river at Friant, nor did it own any right to store any water of said river elsewhere, except so far as it had theretofore permitted said storage for power purposes, nor did it own any right to appropriate or divert any of the water of the San Joaquin River at Friant or to store the same in the said Friant Reservoir or to divert the same into either of the two canals so to be constructed by the defendant, nor did it own any right to transfer the

waters which it had theretofore diverted and used to the said Friant Reservoir or the canals leading therefrom, so as to interfere with the flow of said water to plaintiff when not used by said Miller & Lux Incorporated or with the return thereof to the lands of plaintiff when so used, nor did it own any right to transfer or change the place of diversion or use of the waters which had thertofore been used by others from the said San Joaquin River on lands above the lands of plaintiff so as to store the same in the said Friant Reservoir and so as to divert the same therefrom, and thus prevent the same from flowing or returning to the lands of the plaintiff, nor did it have any right to transfer or change the place of diversion or use of the surplus water of said river over and above the water theretofore appropriated by it or used and reasonably necessary for use on its lands, and none of said rights was conveyed by the plaintiff to the said Miller & Lux Incorporated, nor was any of said rights by said deed made easements in said land or reserved or excepted from the rights of plaintiff in said land, nor did the said Miller & Lux Incorporated thereby acquire or own a right to all of the water of the San Joaquin River or a right to
46 prevent the plaintiff from using said water on his riparian lands, and the said exceptions and reservations in no way authorized said Miller & Lux Incorporated to burden the land by any taking of water by defendant, and the damages so inflicted upon said lands and upon plaintiff were inflicted by reason of interference by defendant with rights owned by the said plaintiff, notwithstanding said reservations and exceptions.

XI.

By reason of the premises the defendant, acting through the United States Bureau of Reclamation, was uncertain as to whether said damages should be paid to the plaintiff herein or to the said Miller & Lux Incorporated and for that reason the said defendant, acting through the United States Bureau of Reclamation, deposited said damages in escrow under the condition that the same should be paid to Miller & Lux Incorporated unless within a period of six years after said taking a judgment should be recovered by plaintiff in the Court of Claims of the United States for damages or compensation for said taking. Plaintiff has endeavored to settle and adjust his claim herein with the Bureau of Reclamation, but for the reason aforesaid has been unable to do so.

XII.

The plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

47 XIII.

The plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government and plaintiff believes the facts as stated in this petiton are true.

XIV.

The following acts of Congress and acts of the Executive Department are relied upon by the plaintiff:

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and containing recommendations as to Federal participation and being a report to the House Committee on rivers and harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this report was laid before the committee together with various acts then before Congress as to the extent and form of Federal participation.

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L. p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000 to the project.

4. The act of Congress approved August 30, 1935 (49 U.S.S.A.L. p. 1028-1038), entitled "An Act authorizing the construction, repair and preservation of
48 certain public works on rivers and harbors and for other purposes", and authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L. p. 1597), entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which act, at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project", appropriated $6,900,000 for the continuance of the project.

7. The Act of Congress dated August 9, 1937 (50 U.S.S.A.L. pp. 564-597), entitled "An Act making appropriation for the Department of Interior for the fiscal year ending June 30, 1938, and for other purposes", by which act $12,500,000 was appropriated for the Central Valley

Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S.A.L. pp. 844-850), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", which act appropriated $12,000,000 to the Central Valley Project.

49 9. The Act of Congress of May 9, 1938 (52 U.S. S.A.L. p. 291), which act appropriated $9,000,000 to the Central Valley Project.

10. The Act of Congress of May 10, 1939 (53 U.S.S.A.L. pp. 685-719), which act, at page 719, appropriated $10,000,000 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L. p. 87), appropriating $5,000,000 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U.S.S.A.L. pp. 406, 438), appropriating $23,000,000 for the Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S. S.A.L. p. 1200), authorizing the project.

14. The Act of Congress of June 28, 1941 (55 U.S. S.A.L. p. 336), appropriating $34,750,000 for the Central Valley Project.

15. The Act of Congress of July 30, 1941 (55 U.S. S.A.L. p. 612), in aid of the construction of the Central Valley Project and granting to the United States title of Indians in land embodied in project.

16. The Act of Congress of December 17, 1941 (55 U.S. S.A.L. p. 827), appropriating $3,000,000 for the project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the project.

WHEREFORE, plaintiff prays that said plaintiff recover judgment against said defendant for the sum

50 of $2874.00, together with a sum equal to interest at seven per cent (7%) per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and for costs of suit.

Dated, San Francisco, California.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

51 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics).

53 *General Traverse in Case No. 46244—Filed December 5, 1944*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) FRANCIS M. SHEA,
Assistant Attorney General.

P. M. C.
N. A. C.
E. E. E.

55 *Intervening Petition of Miller & Lux Incorporated*

Filed March 5, 1945

To the Honorable, the Court of Claims of the United States:

Now comes Miller & Lux Incorporated and appears herein and files its intervening petition pursuant to the order of the above court dated the 10th day of January, 1945, and states:

56 I.

That during all of the times mentioned in plaintiff's petition, and long prior thereto, Miller & Lux Incorporated, hereinafter referred to as intervener, was the owner of a large acreage of land in the Counties of Madera, Fresno, Merced and Stanislaus, State of California, a portion of which was contiguous to the San Joaquin River, its branches and sloughs, and was riparian thereto, and a portion of which was not riparian to said river or sloughs; that of said riparian and non-riparian lands a portion thereof was suitable for the growing of crops and was irrigated by appropriations of water from said river, and the water and water rights so used in such irrigation were and are commonly referred to as crop land water rights; that the remainder of said lands was not suitable for the growing of crops, but was suitable only for the growing of wild grasses for pasturage purposes; that of said lands so used for pasturage purposes a portion was irrigated by appropriations of water from said river, and a portion suitably located was irrigated by overflow at high stages of the river flow, and the portion not properly located in relation to the river flow received no irrigation whatsoever; that such pasture lands as were irrigated by appropriations were and are commonly referred to as grass lands, and the water rights appurtenant thereto were and

are known as grass land water rights; that such pasture lands as were irrigated by overflow from the said river or its sloughs, or which were not irrigated but bordered on the said river or sloughs, were known and referred to as riparian lands; that the lands described in
57 paragraph I of plaintiff's petition were riparian in character by reason of the fact that the patented parcel comprising said lands bordered upon a slough which took out of the San Joaquin River, and none of said lands bordered upon said river.

II.

That commencing in the year 1906 and continuing to the year 1920 intervener entered into contracts with the Southern California Edison Company and the San Joaquin Light and Power Company, and/or their predecessors, for the storage of water on said river so that there would be a more dependable supply of water for the irrigation of said crop lands; and intervener also organized mutual water companies for the more efficient and expeditious distribution of water to said crop lands.

III.

That about the year 1920 intervener commenced to negotiate with the Madera Irrigation District for the sale of its said water rights, except the water rights appurtenant to its said crop lands, which negotiations were carried on until the formation of the San Joaquin River Water Storage District in or about the year 1924; that the project contemplated by said Water Storage District included the project contemplated by said Irrigation District and negotiations for the sale of said water rights were continued with said Water Storage District until said District was dissolved in the year 1929; that shortly thereafter intervener commenced negotiations for the sale of its
58 said water rights to the Fresno Irrigation District and said negotiations were continued up to the time the United States, through the Department of the Interior, opened negotiations for the purchase of said water rights; that no part of said pasture lands of intervener was included within the boundaries of any of the aforementioned districts; that it was the plan and purpose of said districts to provide water for the irrigation of lands within the boundaries of each and thus deprive intervener's pasture lands of any water for irrigation purposes; that a large part of the lands within the boundaries of each of said districts was located outside of the watershed of the San Joaquin River.

IV.

That in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands; that by means of newspaper advertisements, pamphlets, real estate brokers, and such other means as are usually employed in sales campaigns of this nature, intervener offered its lands to the public in two general classifications, lands with water rights, and lands without water rights; that the lands with water rights were crop lands located within the boundaries of the mutual water companies heretofore referred to, and the lands without water rights were the aforesaid pasture lands used for the production of wild grasses, which as aforestated, include the lands described in paragraph I of plaintiff's petition; that at all times a sharp differential in selling price was maintained by intervener as to said two classifications
59 of its lands offered for sale, the pasture lands without water selling at a greatly reduced figure.

V.

That during said sales campaign the land referred to in paragraph I of plaintiff's petition was sold by intervener to plaintiff on the 22nd day of February, 1934, under a ten-year installment contract, which contained, among other things, the following exception and reservation:

"The following property and property rights are excepted and reserved, to-wit:

"All water rights, if any, whether riparian, appropriative or prescriptive, including the right to receive water released from storage reservoirs on the San Joaquin River."

That a similar exception and reservation was incorporated in substantially all contracts for the sale of intervener's pasture lands; that this exception and reservation was made for the sole purpose of depriving said land of any water rights as between intervener, its successors and assigns, and said plaintiff and his heirs and assigns, thus enabling intervener to consummate the sale of all water and water rights appurtenant to said land; that at the time of said sale it was the opinion of counsel for intervener, as well as the opinion of many other lawyers specializing in water law, that an exception and reservation such as contained in said contract with plaintiff created a waiver or estoppel as between grantor and grantee, and their successors and assigns, but did not affect the
59a riparian rights of the land so conveyed in so far as third parties not in privity with the grantor were concerned; that at about the time of said sale of plaintiff

one of the Superior Courts of the State of California held that such an exception and reservation, if carried into a deed, would completely extinguish the riparian right of the land so conveyed, and to avoid such a result, which was never intended by intervener, and to permit the use of water on said land so conveyed, as against all parties other than intervener, its successors and assigns, intervener in its deed to plaintiff, executed on the 20th day of October, 1937, upon completion of all payments due under his contract, substituted for the exception and reservation clause which appeared in the contract, and which is above quoted, the clause quoted in paragraph X of plaintiff's petition herein; and it was provided in the reservation so used in said deed that intervener and its subsidiary and affiliated companies "may use, enjoy and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs and assigns", and the effect of this language was and it was intended to be to entirely deprive said lands so conveyed of any water rights whatsoever, or any rights in and to the waters of said river of any nature or kind as against intervener, its successors and assigns.

VI.

That negotiations for the sale of said grass land water rights to the United States, hereinabove re-
60 ferred to, were consummated on the 27th day of July, 1939, at which time the contract for the sale of said water was made and entered into between intervener and its subsidiary company, the Gravelly Ford Canal Company, and the United States, and under the terms of this contract all the right, title and interest of intervener in and to the waters of the San Joaquin River, except such waters as were reserved for said crop lands, were sold and assigned to the United States for storage at Friant reservoir, a unit of the Central Valley project of the Department of the Interior, and for use as provided by said project. That subsequently, on the 14th day of September, 1939, as provided for in said contract, intervener and said Gravelly Ford Canal Company executed a deed of its interest in said waters to the United States.

VII.

That said contract provided that certain moneys should be paid unconditionally to intervener, and certain other moneys, to wit, $511,350.00, should be placed in escrow to be disposed of as hereinafter set forth. That there was annexed to said contract, marked Exhibit "B", a map

showing the grass lands and riparian lands affected by said contract, which included the lands referred to in plaintiff's petition herein, and the contract provided that:

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said
60a waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit 'B', are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit 'B', are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands, and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River; PROVIDED, that the total obligation of Vendors under this Subdivision (e) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"When final judgments in all suits above described have been entered and payments therefor made as
61 herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities."

That in accordance with the foregoing provisions of said contract the sum of $511,350.00 was placed in escrow with The Bank of California, N. A., in San Francisco, California, and said sum and/or investments in United States of America bonds and notes made therefrom are now on deposit in said escrow. That the plaintiff is not entitled to use on the lands described in its petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

VIII.

That intervener further alleges that the storage of water by the United States as set forth in plaintiff's petition does not constitute a taking within the meaning of the fifth amendment to the Constitution of the United States, and denies generally each and every allegation of plaintiff's petition, and alleges that the land referred to in plaintiff's petition has not been and will not be damaged in the sum of $2,874.00, or any other sum, by reason of said storage of water.

62

IX.

That intervener has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, betted, or given encouragement to rebellion against the said Government.

Wherefore, intervener prays that plaintiff be denied any relief under its said petition.

Dated, San Francisco, California,
February 26, 1945.

J. E. Woolley,
Attorney for Intervener.

63 *Duly sworn to by F. L. Humphrey,*
Jurat omitted in printing. (All in italics).

65 *Appearance of Southern California Edison Company Ltd. in Response to Notice Under Section 14 (b) of Public Law No. 395.*

Filed March 7, 1945

To the Honorable, the Court of Claims of the United States:

Comes now Southern California Edison Company Ltd., a corporation, in response to notice pursuant to an order made by this Honorable Court on January 10, 1945, to appear in the above-entitled suit to assert and defend any interest it may have in said suit, and alleges:

I.

The action is one brought by the plaintiff, Martin Erreca, to recover from the defendant, United States of America, compensation for the alleged taking by the United States in the State of California,

of riparian rights to the waters of the San Joaquin
66 River in the State of California, appertaining to the lands described in the petition herein, which riparian rights and lands plaintiff alleges he owned at the time of the taking by the United States. The compensation for the said taking by the United States claimed by the plaintiff from the defendant by said petition is the sum of $2,874, together with interest at 7 per cent per annum from October 20, 1941 until paid, and said moneys are the subject matter of the action.

II.

Southern California Edison Company Ltd., herein called "Edison Company", is a corporation organized and existing under the laws of the State of California, engaged in the public utility business of generating, transmitting and distributing electric energy in the State of California.

While Miller & Lux Incorporated was the owner of the said lands described in said petition, the Edison Company, or its predecessors, entered into contracts, in writing, with said Miller & Lux Incorporated, whereby Miller & Lux Incorporated, as the owner of said lands described in said petition, and of other large areas of land in the San Joaquin Valley, and of water rights appertaining to said lands or acquired by appropriation, granted to Edison Company, its predecessors and grantors, rights to divert, store and use the waters of the said San Joaquin River and its tributaries for power purposes, the diversion, storage and use of said waters to be at various points in the mountains, many miles upstream from the location of the Friant Dam referred to in said petition. In addition, said contracts

provided for the use of waters for domestic and other
67 purposes incidental to the generation of said power.

The first of said contracts was that dated August 17, 1906, between Miller & Lux Incorporated and Las Animas and San Joaquin Land Company, Incorporated, parties of the first part, and John S. Eastwood, William G. Kerckhoff, A. C. Balch, H. E. Huntington, and Mammoth Power Company, parties of the second part. Thereafter, thirteen contracts, supplemental to said contract dated August 17, 1906, were entered into. All of said supplemental contracts were entered into prior to October 20, 1937.

the date upon which plaintiff alleges he acquired title from Miller & Lux Incorporated to the lands described in said petition.

The Edison Company now owns all of the rights granted by said contract dated August 17, 1906, as supplemented, and the said alleged water rights of the plaintiff at the time of the taking by the United States were and are subject thereto.

The rights of Edison Company under said contract to the diversion, use and storage of the waters of the San Joaquin River above the lands of plaintiff are admitted by said petition.

III.

The rights of the Edison Company to divert, store and use the waters of the San Joaquin River and its tributaries above the lands of the plaintiff are no part of the rights of the plaintiff alleged to have been taken by the United States and for which the plaintiff claims compensation. The said rights of the Edison Company do not constitute any part of those rights alleged to belong to the plaintiff, and for which plaintiff seeks to recover compensation against the United States. The United States has not taken, nor
68 does it propose to take, rights of the Edison Company in and to the waters of the said San Joaquin River and its tributaries. The said rights of Edison Company to the waters of the San Joaquin River and its tributaries as against the said lands alleged to be owned by the plaintiff now exist and will continue to exist after the alleged taking by the United States of the remaining water rights of the plaintiff.

IV.

The Edison Company operates on the San Joaquin River and its tributaries five hydroelectric generating plants, installed and placed in operation between 1913 and 1929, with an aggregate operating capacity of approximately 400,000 kw. Certain of these plants are operated under permits granted by the Secretary of Agriculture under the Act of Congress of February 15, 1901, and others under the licenses issued under the Federal Water Power Act of June 10, 1920. To provide for the diversion and utilization of water through these plants the Edison Company maintains three storage reservoirs, with approximate capacity of 290,000 acre-feet, together with a series of tunnels and conduits extending many miles through the mountains. All of said works are located many miles upstream from the Friant Dam of the United States; and said Friant Dam is located many miles upstream from the lands of the plaintiff.

V.

One of said reservoirs, the Huntington Lake Reservoir, and Power Houses No. 1 and No. 2 were completed in 1913; the balance of the said works, including two reser-
69 voirs and three more power houses, were completed in 1928. Each year since the said works were completed Edison Company or its predecessors have, by means of said works, diverted, stored and used the waters of said San Joaquin River and its tributaries to the extent water was available for the generating of electrical energy at said power houses and certain purposes incidental thereto.

Edison Company alleges that it is the owner of the right to divert, store and use the waters of said San Joaquin River and its tributaries by means of said works for the said purposes, by virtue of (a) appropriations by Edison Company under and in accordance with the terms and provisions of the laws of the State of California, (b) the ownership by Edison Company of lands bordering upon and riparian to said streams, (c) the occupancy and use by Edison Company of lands of the United States riparian to said streams under licenses duly issued to it by the Federal Power Commission pursuant to the provisions of the Act of Congress, known as the Federal Power Act, (d) grants to and contracts with Edison Company by owners of lands riparian to the said San Joaquin River and by owners of appropriated rights to the waters of the said San Joaquin River, and (e) the open, notorious, continuous and adverse use by Edison Company of said waters under a claim of right for more than five years.

All of said water rights of Edison Company are prior to and superior to any right of the plaintiff in and to the waters of the San Joaquin River alleged to have been taken by the United States. The lands described in the said petition herein are subject to all of said rights of Edison Company; said rights are not involved in, and are not the subject matter of, this proceeding and constitute no part of the
70 property of the plaintiff alleged to have been taken by the United States and for which compensation is sought by the plaintiff in this proceeding.

VI.

All of the said water rights of Edison Company, including its rights under the said contracts with said Miller & Lux Incorporated, have been and hereafter will be exercised and enjoyed, and all of the waters of said river and its tributaries aforesaid so diverted, stored and used by Edison Company and its predecessors have been and will be

returned to the main channel of the river by Edison Company at points far above the said Friant Project, except as to certain small amounts of water used incidentally for domestic and other consumptive purposes. The diversion of the waters of said river by the United States by means of the said Friant Project, after the use of said waters by Edison Company and before said waters reach the lands of plaintiff, does not constitute a taking by the United States of any of the rights of Edison Company.

VII.

Edison Company, while claiming to own all of the rights aforesaid and not waiving the same, disclaims any interest in the compensation sought to be recovered by the plaintiff in this proceeding, which is compensation for the taking of certain alleged water rights of the plaintiff which it claims to own subject to the rights of Edison Company.

VIII.

Edison Company has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs I, II, IV, VII, VIII, IX, X, XI and
71 XII of said petition, and placing its denial upon such grounds denies each and every allegation therein contained except as herein specifically admitted or alleged.

IX.

Section 14(b) of Public Law 395 does not grant jurisdiction to the Court of Claims of the United States with respect to the property or other rights of the Southern California Edison Company Ltd. to the waters of the San Joaquin River and its tributaries, or in and to the lands described in the petition herein, or as to the property or other rights of the United States or any other party to this proceeding as against the Edison Company with respect to the use of the waters of said streams, and said Court of Claims is without jurisdiction to proceed in the above-entitled matter against the Edison Company. Said Section 14(b) of said Public Law 395 is applicable only to proceedings involving the termination of contracts, and the jurisdiction of the Court of Claims is not extended except with respect to that particular matter.

X.

Southern California Edison Company Ltd. has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided and abetted or given encouragement to rebellion against said government.

WHEREFORE, Southern California Edison Company Ltd., respectfully prays that the Court of Claims order that
72 said Company be dismissed from these proceedings, and that the Court take no other action in these proceedings with respect to said Company.

Dated this 7th day of March, 1945.

Of Counsel:

GAIL C. LARKIN,
1113 Edison Bldg., 601 W. 5th St.,
Los Angeles 53, California.

PETER Q. NYCE,
1266 National Press Bldg.,
Washington 4, D. C.,
Attorney of Record for Southern California Edison Company Ltd.

Duly sworn to by Peter Q. Nyce.
Jurat omitted in printing. (All in italics).

73 *San Joaquin Light and Power Corporation's Plea to the Jurisdiction With Brief in Support Thereof.—Filed March 7, 1945.*

SAN JOAQUIN LIGHT AND POWER CORPORATION appears in the above entitled matter in response to the order made by the Honorable Court therein on January 10, 1945; avers that it was heretofore a corporation organized and existing under and by virtue of the laws of the State of California; that it was finally dissolved by order of the Superior Court of the State of California in and for the County of Fresno on the 21st day of December, 1944, having prior thereto conveyed and transferred all of its properties, both real and personal, to Pacific Gas and Electric Company, and that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided and abetted or given encouragment to rebellion against said Government.

74 San Joaquin Light and Power Corporation now and hereby moves the Honorable Court to revoke said order and to dismiss said corporation from said action on the ground that the Honorable Court did not have jurisdiction to make said order and does not have jurisdiction to make any order concerning said corporation for the following reasons, to wit:

1. San Joaquin Light and Power Corporation conveyed all of its properties and has been dissolved as above stated.

2. The cause stated in plaintiff's petition does not arise under Public Law 395 78th Congress, Chapter 358 2nd Session, and said court was not authorized by Section 14(b)

of said Public Law to order additional parties brought in except in cases arising under said Act or necessary to give effect to said Act. This case does not arise under said "Termination of Contracts Act".

3. Neither plaintiff's petition nor defendant's answer thereto shows any interest in or claim by San Joaquin Light and Power Corporation to the or any of the riparian rights of plaintiff or to any funds deposited in escrow by Miller & Lux Inc. Said petition shows that plaintiff owns riparian rights in waters of the San Joaquin River naturally flowing at the lands in the petition described subject to rights granted by Miller & Lux Inc. to San Joaquin Light and Power Corporation to store water above Friant Dam for the use of said corporation for power purposes and subsequent use by Miller & Lux Inc. and others, and such rights of San Joaquin Light and Power Corporation were not and are not included as the basis for any compensation claimed by plaintiff.

75 4. The storage and use by San Joaquin Light and Power Corporation all occurred above Friant Dam and could not and cannot be interfered with by the storage of water by said dam and San Joaquin Light and Power Corporation is not required to make any claim against the limited rights claimed by plaintiff or any claim against or interest in the fund deposited in escrow as alleged in his petition.

5. The respective rights of San Joaquin Light and Power Corporation and Miller & Lux Inc. and its subsidiaries and affiliated companies and their successors in interest were fully adjudicated and determined in an action brought in the Superior Court of the State of California in and for the County of Fresno in an action involved in an appeal to the District Court of Appeal of the State of California in and for the Fourth Appellate District (136 Cal. App. 495) and in a further appeal to the Supreme Court of California (8 Cal. (2d) 427), and this Honorable Court has no jurisdiction to review or retry the question of title to any such water or water rights involved in determining the matter of compensation to plaintiff pursuant to his said petition.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation,
1026 16th St., N. W.,
Washington 6, D. C.

Of Counsel:
ROBERT H. GERDES,
245 Market Street,
San Francisco 6,
California.

In his petition plaintiff expressly admits that the riparian rights for which he claims compensation have been reduced by the express exceptions and reservations contained in the grant to him by Miller & Lux Inc. Such exceptions and reservations include rights granted by said Miller & Lux Inc. to San Joaquin Light and Power Corporation to store waters of the San Joaquin River and use the same for power purposes above Friant dam, and neither petitioner nor any other party has challenged the said or any other rights of said San Joaquin Light and Power Corporation. All of the storage and uses of water of the San Joaquin River were made above Friant dam and San Joaquin Light and Power Corporation never claimed or had any rights whatsoever to use any of the waters of said river below said dam. The lands of plaintiff described in its petition are more than fifty miles downstream from Friant dam.

In his petition plaintiff only claims compensation for the taking of such riparian rights as he may presently have and does not show that San Joaquin Light and Power Corporation has ever made any claim to any share in any compensation which may be awarded to plaintiff against the defendant or that it is in any way interested in any amount thereof or would be in any way affected thereby. Neither the petition nor the answer of the defendant shows that San Joaquin Light and Power Corporation is making any claim to or has any interest in the money deposited in escrow by the defendant through the United States Bureau of Reclamation for the purpose of compensating owners of riparian lands situated along the San Joaquin River below said Friant dam.

77 The rights of the San Joaquin Light and Power Corporation to store water on the upper reaches of the San Joaquin River including its rights under the agreement with Miller & Lux Inc., referred to in the exceptions and reservations in plaintiff's deed from Miller & Lux Inc., was fully adjudicated and established in the case of *Miller & Lux Inc.* v. *San Joaquin Light and Power Corp.*, decided in 136 Cal. App. Rep. p. 495 and 8 Cal. Rep. (2) 427; and as against the plaintiff and all other owners of riparian lands who derive titles through Miller & Lux Inc., including Miller & Lux, by judgment of the Superior Court of the State of California, in and for Stanislaus County, in the case of *L. A. Vandervort* v. *San Joaquin Light and Power Corp., et al.*, No. 14642.

Even if this court had jurisdiction to require it, a matter we do not concede, it would be unjust and inequitable to

compel San Joaquin Light and Power Corporation to appear herein and to meet the burden and expense of proving its former rights to uses of water above Friant dam where it has no interest in the controversy, and benefit of its effort and expense would go solely to the defendant.

POINTS AND AUTHORITIES.

Said court did not have jurisdiction under Section 14(b) of Public Law 395—78th Congress, Chapter 358—2nd Session, to summon the San Joaquin Light and Power Corporation to assert and defend its rights to the use of the waters of the San Joaquin River as heretofore used and claimed to exist for the reason that the claim set forth in plaintiff's petition does not arise under said Public Law and is not necessary to give effect to said act.

78 Section 14(b) of said Public Law provides:

"(b) The Court of Claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interest, if any, in such suit or proceeding, within such period of time prior to judgment as the Court of Claims shall prescribe. . . ."

Section 14(c) of said Public Law expressly limits such extended jurisdiction to matters arising under said Public Law. Section 14(c) of said Public Law provides:

"(c). The jurisdiction of the Court of Claims shall not be affected by this Act except to the extent necessary to give effect to this Act, and no person shall recover judgment on any claim, or on an interest on any claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted."

A careful reading of plaintiff's petition discloses that his claim, if any arises under the Fifth Amendment to the Constitution of the United States, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 37 L. Ed. 463; *Judicial Code*, Section 145, 28 *U.S.C.A.* Section 250.

The jurisdiction of the Court of Claims is confined to the rendition of money judgments against the United States. *United States* v. *Alire*, 6 Wall (U. S.) 573, 18 L. Ed. 947; *United States* v. *Jones*, 131 U. S. 1, 33 L. Ed. 90; *United States* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1059.

While evidence of the extent of the water rights so excepted and reserved may become pertinent to the
79 determination of the amount of just compensation to be paid plaintiff for any taking of his present riparian rights, neither the petition of plaintiff nor the

answer of defendant shows that San Joaquin Light and Power Corporation claims any interest in the riparian rights now owned by plaintiff or in any fund deposited in escrow by defendant to compensate plaintiff for the taking of such rights. This court has no jurisdiction to compel San Joaquin Light and Power Corporation to litigate its water rights with the plaintiff in order that the defendant might more readily ascertain the value of the rights remaining in plaintiff and the compensation due to plaintiff for the taking of such rights.

In the case of *United States* v. *Sherwood*, *supra*, the court said:

> "If the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court."
>
> *United States* v. *Jones*, 131 U. S. 1, 33 L. Ed. 90.
>
> *Lynn* v. *United States*, 110 Fed. (2d) 586.

If plaintiff had sought to bring into this action the San Joaquin Light and Power Corporation in order to ascertain the extent of his rights, the Court of Claims would be without jurisdiction to try such case.

In the case of *United States* v. *Sherwood*, *supra*, the court said:

> If its maintenance against private parties is prerequisite to the suit against the United States the suit must be dismissed."
>
> *Turner* v. *United States*, 248 U. S. 354, 63 L. Ed. 291.
>
> *Pac. Mutual Life Ins. Co.* v. *United States*, 44 Fed. (2d) 887.

80 As the storage of water and the use of the same for power purposes by the San Joaquin Light and Power Corporation cannot be interfered with by the storage of water in Friant dam, and Miller & Lux Incorporated could not, even if it had assumed so to do, convey to the defendant the rights theretofore granted to said San Joaquin Light and Power Corporation, there is nothing before the court to indicate that said company has any interest in said fund or any compensation to be paid to the plaintiff for the taking of his riparian rights. The situation is quite unlike that appearing in *Intermingled Cotton cases*, 92 U. S. 654, where each owner of cotton in the pool had an interest in the common fund derived from the sale of the same.

> *Miller & Lux, Inc.* v. *San Joaquin Lt. & Power Corp.*, 136 Cay. App. 495.
>
> *Miller & Lux, Inc.* v. *San Joaquin Lt. & Power Corp.*, 8 Cal. (2d) 427.

For the reasons hereinabove stated it is respectfully submitted that the order of said court made on the 10th day of January 1945 should be revoked, and the San Joaquin Light and Power Corporation should be dismissed from said action.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation.

Of Counsel:
ROBERT H. GERDES,
245 Market Street,
San Francisco 6,
California.

81 *Answer of Plaintiff to Intervening Petition of Miller & Lux Incorporated.—Filed March 28, 1948.*

Now comes the plaintiff and answering the intervening petition of Miller & Lux Incorporated, admits, alleges and denies as follows:

I.

Answering Paragraph I of said intervening petition, plaintiff denies that the land described in Paragraph I of plaintiff's petition is not suitable for the growing of crops, and on the contrary alleges that all of said land is
82 suitable for the growing of crops, and denies that none of said lands border on the San Joaquin River.

II.

Answering Paragraph IV of said petition, plaintiff denies all of the allegations thereof except that he admits and alleges that in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands, but denies that by any means it offered its lands to the public in two general classifications, lands with water rights, and lands without water rights, but on the contrary alleges that it entered into numerous different kinds of contracts with numerous and different provisions in regard to water rights. Plaintiff denies that the lands with water rights were crop lands located within the boundaries of the mutual water companies referred to, but on the contrary alleges that much of the lands which were crop lands and within the boundaries of said mutual water companies were sold with limited water rights, and he denies that the lands without water rights, used for the production of wild grasses, include the lands described in plaintiff's petition, and on the contrary alleges that the pasture lands were sold with

the water rights that were granted therewith and were a part thereof and which were not reserved and excepted from such grant. Plaintiff admits that there was a sharp differential in selling price between crop lands and pasture lands, but he alleges that the price depended on the character of water right retained by said lands, and that the matter as to what water should go with the land was in all cases a matter of negotiation between the seller and the purchaser.

83

III.

Answering Paragraph V of said intervening petition, plaintiff denies that a similar exception or reservation was incorporated in substantially all contracts for the sale of intervener's pasture lands, and denies that this exception and reservation was made for the sole purpose of depriving said land of any water rights as between intervener, its successors and assigns, and said plaintiff and his heirs and assigns, thus enabling intervener to consummate the sale of all water and water rights appurtenant to said land, but on the contrary alleges that the real purpose of said provision was to reserve to said intervener the water rights which it owned on the other land, and the said deed dated October 20, 1937 was made to correctly set forth the actual intent of the parties, and plaintiff denies that the effect of the language of said deed was or was intended to entirely deprive said land so conveyed of any water rights whatsoever or any rights in and to the waters of said river of any nature or kind as against intervener, its successors and assigns, and on the contrary plaintiff alleges that the effect of said reservation was as stated in the petition of plaintiff herein.

IV.

Answering Paragraph VII of said petition, plaintiff denies that plaintiff is not entitled to use on the lands described in his said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

84

V.

Plaintiff denies all the allegations of Paragraph VIII of said petition.

VI.

Further answering said petition, plaintiff alleges that the escrow referred to therein was made for the benefit of

plaintiff and in law inures to his benefit to the extent provided by said agreement creating said escrow

WHEREFORE, plaintiff prays that intervener take nothing by its intervention, and that plaintiff recover judgment as prayed for in his petition, and that it be further adjudged that plaintiff is entitled to recover the compensation adjudged to him herein from the escrow referred to in said intervention, to the extent provided by said agreement creating said escrow.

Dated, San Francisco, California.
March 20, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

85 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics.)

87 IN THE

COURT OF CLAIMS OF THE UNITED STATES

No. 46245.

J. SHELDON POTTER, PLAINTIFF,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46245—Filed Oct. 26, 1944.

To the Honorable, the Court of Claims of the United States:

Now comes the plaintiff above named, and complaining of the defendant above named, alleges and shows to the court:

I.

At all times herein mentioned the plaintiff herein has been and now is, subject to the "conditions, covenants and reservations" hereinafter set forth, the owner in fee,
88 in the possession and entitled to the possession of all those certain lots, pieces and parcels of land, together with the appurtenances, situated in the County of Merced, State of California, and more particularly bounded and described as follows:

A. All of Swamp and Overflowed Land Surveys Nos. 297, 359, 307, 312, 311, 295, 296, 245, 294, 299, 313, 323, 324, 197, 196, 203, 202, 201.

B. All of the South half of Swamp and Overflowed Land Survey No. 298.

C. All of Swamp and Overflowed Land Survey No. 150 lying East of the Easterly line of the East Side Canal & Irrigation Co.'s East-Side Canal.

D. All that portion of Swamp and Overflowed Land Survey No. 361 described as follows:

Beginning at the northwest corner of the south half of the southwest quarter of Section 11, Township 9 South, Range 12 East, M. D. B. & M. (being portion of Swamp and Overflow Lot 361); thence due East 2639.05 feet to the northeast corner of said south half of the southwest quarter; thence north 0° 33½′ West 559.04 feet to the center line of a slough; thence along the center line of said slough the following courses and distances: North 72° 02½′ West 170.00 feet; North 0° 9′ East 675.00 feet; North 41° 15′ West 365.00 feet; North 27° 08′ West 355.00 feet; North 61° 03′ West 640.00 feet; North 18° 49′ West 290.00 feet; North 34° 01′ West 217.00 feet; thence leaving slough, South 89° 58½′ West 1294.60 feet to the West line of said Section 11; thence South along the west line of said Section and Swamp and Overflow Land Survey 361, 2640.00 feet to the point of beginning. Containing 133.25 acres, more or less.

89 *E.* All that portion of Swamp and Overflowed Land Survey No. 346, described as follows:

Beginning at the northwest corner of Section 13, Township 9, South Range 12 East, M. D. B. & M. (said Section 13 being Swamp and Overflow 346); thence south 5280.00 feet to the southwest corner of said Section 13; thence East 5278.65 feet to the southeast corner of said Section 13; thence North 285.00 feet to the center line of a slough; thence along the center line of said slough, the following courses and distances: North 55° 53½′ West 305.00 feet; North 33° 50′ West 175.00 feet; North 8° 48′ West 235.00 feet; North 29° 56′ West 225.00 feet; North 54° 26½′ West 305.00 feet; North 26° 05½′ West 205.00 feet; North 59° 41′ West 185.00 feet; North 6° 39′ East 140.00 feet; North 35° 30′ West 110.00 feet; North 20° 13½′ East 125.00 feet; North 54° 07½′ West 335.00 feet; North 18° 20½′ West 250.00 feet; North 46° 26½′ West 115.00 feet; North 13° 38½′ West 430.00 feet; North 5° 04½′ West 395.00 feet; North 62° 14½′ West 180.00 feet; North 2° 33′ East 280.00 feet; North 38° 46½′ East 230.00 feet; North 26° 20½′ East 205.00 feet; North 20° 20′ West 180.00 feet; North 60° 48½′ West 110.00 feet; North 87° 38½′ West 160.00 feet; North 50° 59′ West 175.00 feet; North 77° 47½′ West 320.00 feet; South

11° 20′ West 185.00 feet; North 81° 41½′ West 295.00 feet; North 61° 13½′ West 155.00 feet; North 84° 58½′ West 185.00 feet; North 64° 56½′ West 135.00 feet; North 2° 46′ West 155.00 feet; North 38° 07½′ West 315.00 feet; North 12° 27′ West 120.00 feet; South 86° 23½′ West 390.00 feet; South 70° 25½′ West 335.00 feet; North 38° 52½′ West 260.00 feet; North 27° 21′ West 185.00 feet; North 53° 51′ West 295.00 feet; North 5° 55½′ East 60.70 feet to the North line of said section and Swamp and Overflowed Land Survey No. 346; thence West 845.50 feet to the point of beginning containing 446.40 acres, more or less.

Reserving a thirty foot road easement along the north line of Survey 346, and along the north line of Survey 296, for use as a public road.

All being in Township 9 South, Range 12 East M. D. B. & M.

F. Location No. 3288, Swamp and Overflowed Lands in Sections 9 and 16, Township 9 South, Range 12 East, M. D. B. & M., described as follows:

Beginning at ¼ section corner between Sections 8 and 9, Township 9 South, Range 12 East, M.D.M., thence East 11.50 chains; thence South 72.90 chains to San Joaquin River, thence down stream North 77° West 3.71 chains; thence South 71¼° west 8.33 chains; thence North 74.75 chains to point of beginning, containing 84.08 acres, more or less.

Subject to:

Right of way for all presently existing roads, highways, telephone, telegraph and electric power and pipe lines, sewers, drainage ditches, canals and other drainage, reclamation and irrigation works, and the easement to maintain, operate and repair the same.

Said lands containing in the aggregate 6038.14 acres.

II.

The San Joaquin River is a natural watercourse arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as "Friant" in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as "Mendota" and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

III.

All of said lands lie along and border upon channels of the said San Joaquin River and are riparian thereto, and

the plaintiff as the owner of said lands, subject to said "conditions, covenants and reservations", was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of a riparian owner with respect thereto, including the right to the use of the waters of the said river for irrigation of said land, for the watering of livestock thereon and for domestic purposes thereon.

IV.

On or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America formulated a project for the irrigation of the large area of privately owned land non-riparian to said river situated to the north and south of Friant in the counties of Madera, Merced,
92 Fresno, Tulare, Kings and Kern in the State of California by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the other leading south from said reservoir though the counties of Fresno, Tulare, Kings, and Kern. Said plan contemplated the acquisition or taking and the storage, diversion and use by the United States of America through the said Bureau of Reclamation, of all the waters of the San Joaquin River, and particularly all of the water of said river which customarily flowed by, through, over and upon the lands of the plaintiff and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

V.

At and prior to any of the times herein mentioned large amounts of water of the San Joaquin River had been either appropriated by other persons or used by riparian owners on said river (other than those mentioned in the "conditions, covenants and reservations" hereinafter set forth) for the irrigation of pasture lands, between the location of Friant Reservoir and the land of plaintiff, and the plan of the defendant also contemplated the acquisition by purchase or condemnation of all of the rights of such persons in and to the waters of the San Joaquin River and the storage, diversion and use of said
93 water by the defendant by means of its said reservoir and canals at Friant. The use and appropria-

tion of said water of the San Joaquin River by the various persons so using and appropriating the same above the land of plaintiff resulted in said water flowing to the land of plaintiff when not used by such users and appropriators and resulted in the retention of said water in the land so irrigated and the ultimate return of large portions thereof to the said San Joaquin River and branch channels thereof above the land of plaintiff, and the plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of plaintiff and said land of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

VI.

At and prior to any of the times herein mentioned large amounts of water flowed in the San Joaquin River, in addition to the amounts theretofore appropriated from said river by other persons and in addition to the amount customarily used by riparian owners above the said land of plaintiff, and in addition to the reasonable amount necessary for use upon land riparian to said river situated above said land of plaintiff, and said water from time immemorial had flowed down said river and through said channels of said river and by, through, over and upon said land of plaintiff and would naturally continue to so flow except for the taking by defendant, and the
94 plan of said defendant contemplated the acquisition by purchase or condemnation by defendant of all the rights of said plaintiff or said land of plaintiff in and to said waters and in and to the use thereof, for storage, diversion and use by the defendant by means of its said reservoir and canals at Friant.

VII.

The said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevent the same from flowing by, through, over and upon the land of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VIII.

The said defendant through its said Bureau of Reclamation has heretofore investigated the damage which has resulted to plaintiff and his lands and the compensation to which plaintiff is entitled by reason of the taking aforesaid and has concluded and found that the said land has been damaged in the sum of $54,343.26 by the said taking, and plaintiff alleges that in fact the said rights of plaintiff in the said land and in the waters of the San Joaquin River have been damaged in the sum of $90,572.10 by the taking aforesaid as against the rights of plaintiff in said land and water, and said sum, together with a sum equal to interest thereon from the date of taking to the date of payment at seven per cent (7%) per annum, constitutes the reasonable value of the rights of the plaintiff so taken and the reasonable compensation which the defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

IX.

The defendant has not paid said sums or any part thereof. The said payment has not been made for the following reasons:

The said plaintiff acquired said land together with its appurtenances from Miller & Lux Incorporated, a corporation, by deed dated Nov. 30, 1935, which deed contained the following "conditions, covenants and reservations":

(1) To all existing water rights of the Grantor and its subsidiary companies, to-wit: The San Joaquin & Kings River Canal & Irrigation Company, Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Columbia Canal Company, San Luis Canal Company and Santa Rita Irrigation Company, and whether established by appropriation, prescription or existing contract, and the right of the Southern California Edison Company, Ltd. and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor.

(2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it or them, by appropriation or prescription, in or to the waters of the San Joaquin River or its tributaries (Grantor hereby declares that it will never assert as against Grantee, his heirs, successors and assigns, that an appropriate or prescriptive water right is appurtenant to the land herein conveyed), and to store and or change the place of use of such

water, whether within or without the watershed of said river, and such right of storage of such water, the right to which has already been established by appropriation or prescription, and or change of place of its use, may be exercised by any purchaser or assignee of said water rights.

That at the date of said deed said Miller & Lux was the owner of large tracts of land riparian and non-riparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River, and by reason thereof was the owner of the right to divert and use a reasonable quantity of water of said river for the irrigation of said land, the watering of live-stock and domestic uses thereon. Likewise said subsidiary corporations, The San Joaquin and Kings River Canal & Irrigation Co., Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Columbia Canal
97 Company, San Luis Canal Company, and Santa Rita Irrigation Company, had theretofore appropriated and used certain quantities of water of the San Joaquin River for the irrigation of certain tracts of land owned by said Miller & Lux Incorporated and others and were the owners of the right to divert and use the amount of water of said river theretofore diverted and used thereon not exceeding the amount reasonably necessary for that purpose. Likewise Southern California Edison Company and San Joaquin Light and Power Corporation had acquired the right to store certain definite quantities of water of said river in certain designated reservoirs under certain contracts with Miller & Lux Incorporated and to use the same for the production of hydroelectric power and to return the same to the San Joaquin River far above the land of plintiff.

By said deed and the said "conditions, covenants and reservations" Miller & Lux Incorporated subjected the riparian rights of the land of plaintiff to the said water rights of Miller & Lux Incorporated and its subsidiary companies, including the right to sell and convey such rights and change the place of use of the water so owned. It also subjected the riparian rights of said land to the said water rights of Southern California Edison Company and San Joaquin Light & Power Corporation. It did not otherwise detract from the riparian rights of the plaintiff's land, nor did it detract from the rights of the land in the water of the river in excess of the rights specifically mentioned. The parties mentioned in said "con-
98 ditions, covenants and reservations" did not thereby acquire or own a right to all of the Waters of

the San Joaquin River or a right to prevent the plaintiff from using on his said riparian lands that water of said river in excess of the rights so reserved, nor did they take away from said land of plaintiff the right to object to the sale or change of place of use of waters theretofore used by persons other than those mentioned in said "conditions, covenants and reservations" where such sale or change was detrimental to plaintiff's land; nor did said "conditions, covenants and reservations" in any way burden the land of plaintiff by any taking of water of said river by defendant (other than the taking or acquisition of the said rights of the parties mentioned in said "conditions, covenants and reservations"), and the damage inflicted upon said land, and upon plaintiff by the taking aforesaid were inflicted by reason of interference by defendant with rights owned by said plaintiff, notwithstanding said "conditions, covenants and reservations".

X.

By reason of the premises the defendant, acting through the United States Bureau of Reclamation, was uncertain as to whether said compensation should be paid to the plaintiff herein or to the said Miller & Lux Incorporated and for that reason the said defendant, acting through the United States Bureau of Reclamation, deposited said compensation in escrow under the condition that the same should be paid to Miller & Lux Incorporated unless within a period of six years after said taking a judgment
99 should be recovered by plaintiff in the Court of Claims of the United States for compensation for such taking. Plaintiff has endeavored to settle and adjust his claim herein with the Bureau of Reclamation, but for the reason aforesaid has been unable to do so.

XI.

The plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

XII.

The plaintiff herein and all prior owners of the claim made herein have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government and plaintiff believes the facts as stated in this petition are true.

XIII.

The following acts of Congress and regulations of the Executive Department are relied upon by plaintiff.

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and

containing recommendations as to Federal participation and being a report to the House Committee on rivers and harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this
100 report was laid before the committee together with various acts then before Congress as to the extent and form of federal participation.

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L., p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000 to the project.

4. The Act of Congress approved August 30, 1935 (49 U.S.S.A.L., pp. 1028-1038), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes", and authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L., p. 1597), entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which act at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project" appropriated $6,000,000 for the continuance of the project.

101 7. The Act of Congress dated August 9, 1937 (50 U.S.S.A.L., pp. 564-597), entitled "An Act making appropriation for the Department of Interior for the fiscal year ending June 30, 1938, and for other purposes", by which act $12,500,000 was appropriated for the Central Valley Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S.A.L., pp. 844-850), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", which act appropriated $12,000,000 to the Central Valley Project.

9. The Act of Congress of May 9, 1938 (52 U.S.S.A.L., p. 291), which act appropriated $9,000,000 to the Central Valley Project

10. The Act of Congress of May 10, 1939 (53 U.S.S.A.L., pp. 685-719), which Act, at page 719, appropriated $10,000,000 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L., p. 87), appropriating $5,000,000 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U.S.S.A.L., pp. 406, 438), appropriating $23,000,000 for Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S.S.A.L., p. 1209) authorizing the project.

102 14. The Act of Congress of June 28, 1941 (55 U.S.S.A.L., p. 336), appropriating $34,750,000 for the Central Valley Project.

15. The Act of Congress of July 30, 1941 (55 U.S.S.A.L., p. 612), in aid of the construction of the Central Valley Project and granting to the United States title of Indians in land embodied in project.

16. The Act of Congress of December 17, 1941 (55 U.S.S.A.L., p. 827), appropriating $3,000,000 for the project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the project.

WHEREFORE, plaintiff prays that he recover judgment against said defendant for the sum of $90,572.10, together with a sum equal to interest at seven per cent (7%) per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and for costs of suit.

Dated, San Francisco, California.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

103 *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing.* (All in italics.)

105 *General Traverse to Case No. 16245. Filed December 5, 1941.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) FRANCIS M. SHEA,
Assistant Attorney General.

P.M.C.
N.A.C.
E.E.E.

107 *Intervening Petition of Miller & Lux Incorporated—Filed March 14, 1945.*

To the Honorable, the Court of Claims of the United States:

Now comes Miller & Lux Incorporated and appears herein and files its intervening petition pursuant to the order of the above court dated the 31st day of January, 1945, and states:

108 I.

That during all of the times mentioned in plaintiff's petition, and long prior thereto, Miller & Lux Incorporated, hereinafter referred to as intervener, was the owner of a large acreage of land in the Counties of Madera, Fresno, Merced and Stanislaus, State of California, a portion of which was contiguous to the San Joaquin River, its branches and sloughs, and was riparian thereto and a portion of which was not riparian to said river or sloughs; that of said riparian and non-riparian lands a portion thereof was suitable for the growing of crops and was irrigated by appropriations of water from said river, and the water and water rights so used in such irrigation were and are commonly referred to as crop land water rights; that the remainder of said lands was not suitable for the growing of crops, but was suitable only for the growing of wild grasses for pasturage purposes; that of said lands so used for pasturage purposes a portion was irrigated by appropriations of water from said river, and a portion suitably located was irrigated by overflow at high stages of the river flow, and the portion not properly located in relation to the river flow received no irrigation whatsoever; that such pasture lands as were irrigated by appropriations were and are commonly referred to as grass lands, and the water rights appurtenant thereto were and are known as grass land water rights; that such pasture lands as were irrigated by overflow from the said river or its sloughs, or which were not irrigated but bordered on the said river or sloughs, were known and referred to as riparian lands; that the

109 lands described in paragraph I of plaintiff's petition were riparian in character by reason of the fact that the patented parcels comprising said lands bordered upon the San Joaquin River, or were touched by high water of the river or bordered on sloughs which took out of the river.

II.

That commencing in the year 1906 and continuing to the year 1920 intervener entered into contracts with the South-

ern California Edison Company and the San Joaquin Light and Power Company, and or their predecessors, for the storage of water on said river so that there would be a more dependable supply of water for the irrigation of said crop lands; and intervener also organized mutual water companies for the more efficient and expeditious distribution of water to said crop lands.

III.

That about the year 1920 intervener commenced to negotiate with the Madera Irrigation District for the sale of its said water rights, except the water rights appurtenant to its said crop lands, which negotiations were carried on until the formation of the San Joaquin River Water Storage District in or about the year 1924; that the project contemplated by said Water Storage District included the project contemplated by said Irrigation District and negotiations for the sale of said water rights were continued with said Water Storage District until said District was dissolved in the year 1929; that shortly thereafter intervener
110 commenced negotiations for the sale of its said water rights to the Fresno Irrigation District and said negotiations were continued up to the time the United States, through the Department of the Interior, opened negotiations for the purchase of said water rights; that no part of said pasture lands of intervener was included within the boundaries of any of the aforementioned districts; that it was the plan and purpose of said districts to provide water for the irrigation of lands within the boundaries of each and thus deprive intervener's pasture lands of any water for irrigation purposes; that a large part of the lands within the boundaries of each of said districts was located outside of the watershed of the San Joaquin River.

IV.

That in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands; that by means of newspaper advertisements, pamphlets, real estate brokers, and such other means as are usually employed in sales campaigns of this nature, intervener offered its lands to the public in two general classifications, lands with water rights, and lands without water rights; that the lands with water rights were crop lands located within the boundaries of the mutual water companies heretofore referred to, and the lands without water rights were the aforesaid pasture lands used for the production of wild grasses, which as aforestated, include the lands described in paragraph I of plaintiff's petition; that at all times a sharp differential

in selling price was maintained by intervener as to
111 said two classifications of its lands offered for sale, the pasture lands without water selling at a greatly reduced figure.

V.

That during said sales campaign the land referred to in paragraph I of plaintiff's petition was sold by intervener to plaintiff, and on the 30th day of November, 1935 a deed conveying said land was delivered to plaintiff, which deed contained, among other things, the conditions, covenants and reservations set forth in paragraph IX of plaintiff's petition. That the said conditions, covenants and reservations had the effect of excepting and reserving in intervener, its successors and assigns, its subsidiary companies, and the Southern California Edison Company and the San Joaquin Light and Power Corporation all of the usual, ordinary and normal flows of the San Joaquin River, leaving only the unusual, extraordinary and enemy waters which may from time to time flow in said river, none of which is beneficial to said lands of plaintiff, and none of which feed riparian or other rights on said river, and in respect of said unusual, extraordinary and enemy waters the plaintiff has attempted by means of levees and dikes, which he has constructed at great expense, to prevent said waters from flowing onto and damaging his said lands. That all of the usual, ordinary and normal flows of said river at all the times mentioned in plaintiff's petition have been and now are put to beneficial use by intervener, said subsidiary companies, and the
112 said power companies, and none of said waters has been used by the plaintiff on his said lands.

VI.

That negotiations for the sale of said grass land water rights to the United States, hereinabove referred to, were consummated on the 27th day of July, 1939, at which time the contract for the sale of said water was made and entered into between intervener and its subsidiary company, the Gravelly Ford Canal Company, and the United States, and under the terms of this contract all the right, title and interest of intervener in and to the waters of the San Joaquin River, except such waters as were reserved for said crop lands, were sold and assigned to the United States for storage at Friant reservoir, a unit of the Central Valley project of the Department of the Interior, and for use as provided by said project. That subsequently, on the 14th day of September, 1939, as provided for in said contract, intervener and said Gravelly Ford Canal Company

executed a deed of its interest in said waters to the United States.

VII.

That said contract provided that certain moneys should be paid unconditionally to intervener, and certain other moneys, to wit, $511,350.00, should be placed in escrow to be disposed of as hereinafter set forth. That there was annexed to said contract, marked Exhibit "B", a map showing the grass lands and riparian lands affected by
113 said contract, which included the lands referred to in plaintiff's petition here, and the contract provided that:

"In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit 'B', are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow an amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grass lands.

"In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit 'B', are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands, and $13.00 per acre for each acre of said grass lands, which by said judgments are decreed to be entitled to receive such water
114 from the San Joaquin River: Provided, that the total obligation of Vendors under this Subdivision (c) of Article 14 shall not exceed but shall be limited to the principal of funds or securities so escrowed, exclusive of costs incidental to said escrow.

"When final judgments in all suits above described have been entered and payment therefor made as herein provided, or such suits have been finally dismissed, the balance of securities remaining in the hands of the escrow agent shall be delivered to the Vendors. Final adjustment shall then also be made to cover discrepancies between amounts actually owing to the United States hereunder, and amounts actually paid by the periodic delivery of securities."

That in accordance with the foregoing provisions of said contract the sum of $511,350.00 was placed in escrow with The Bank of California, N. A., in San Francisco, California, and said sum and/or investments in United States of America bonds and notes made therefrom are now on deposit in said escrow. That the plaintiff is not entitled to use on the lands described in its said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

VIII.

That intervener further alleges that the storage of water by the United States as set forth in plaintiff's petition does not constitute a taking within the meaning of the fifth amendment to the Constitution of the United States, and denies generally and specifically each and every allegation of plaintiff's petition, and alleges that the land referred to in plaintiff's petition has not been and will not be damaged in the sum of $90,572.10, or any other sum, by reason of said storage and use of water.

IX.

That intervener has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

WHEREFORE, intervener prays that plaintiff be denied any relief under its said petition.

Dated, San Francisco, California,
March 7, 1945.

J. E. WOOLLEY,
Attorney for Intervener.

Duly sworn to by F. L. Humphrey.
Jurat omitted in printing. (*All in italics.*)

117

Appearance of Southern California Edison Company Ltd. in Response to Notice Under Section 14(b) of Public Law No. 395.—Filed March 19, 1945.

To the Honorable, the Court of Claims of the United States:

Comes now SOUTHERN CALIFORNIA EDISON COMPANY LTD., a corporation, in response to notice pursuant to an order made by this Honorable Court on January 10, 1945, to appear in the above-entitled suit to assert and defend any interest it may have in said suit, and alleges:

I.

The action is one brought by the plaintiff, J. Sheldon Potter, to recover from the defendant, United States
118 of America, compensation for the alleged taking by the United States of riparian rights to the waters of the San Joaquin River in the State of California, appertaining to the lands described in the petition herein, which riparian rights and lands plaintiff alleges he owned at the time of the taking by the United States. The compensation for the said taking by the United States claimed by the plaintiff from the defendant by said petition in the sum of $90,572.10, together with interest at 7 per cent per annum from October 20, 1941 until paid, and said moneys are the subject matter of the action.

II.

Southern California Edison Company, Ltd., herein called "Edison Company", is a corporation organized and existing under the laws of the State of California, engaged in the public utility business of generating, transmitting and distributing electric energy in the State of California.

While Miller & Lux Incorporated was the owner of the said lands described in said petition, the Edison Company, or its predecessors, entered into contracts, in writing, with said Miller & Lux Incorporated, whereby Miller & Lux Incorporated, as the owner of said lands described in said petition, and of other large areas of land in the San Joaquin Valley, and of water rights appertaining to said lands or acquired by appropriation, granted to Edison Company, its predecessors and grantors, rights to divert, store and use the waters of the said San Joaquin River and its tributaries for power purposes, the diversion, storage and use of said waters to be at various points in the mountains, many miles upstream from the location of the Friant Dam referred to in said petition. In addition, said con-

119 tracts provided for the use of waters for domestic and other purposes incidental to the generation of said power. The first of said contracts was that dated August 17, 1906, between Miller & Lux Incorporated and Las Animas and San Joaquin Land Company, Incorporated, parties of the first part, and John S. Eastwood, William G. Kerckhoff, A. C. Balch, H. E. Huntington, and Mammoth Power Company, parties of the second part. Thereafter, thirteen contracts, supplemental to said contract dated August 17, 1906, were entered into. All of said supplemental contracts excepting the last one, which was dated November 25, 1936, were entered into prior to November 30, 1935, the date upon which plaintiff alleges he acquired title from Miller & Lux Incorporated to the lands described in said petition.

The Edison Company now owns all of the rights granted by said contract dated August 17, 1906, as supplemented, and the said alleged water rights of the plaintiff at the time of the taking by the United States were and are subject thereto.

The rights of Edison Company under said contract to the diversion, use and storage of the waters of the San Joaquin River above the lands of the plaintiff are admitted by said petition.

III.

The rights of the Edison Company to divert, store and use the waters of the San Joaquin River and its tributaries above the lands of the plaintiff are no part of the rights of the plaintiff alleged to have been taken by the United States and for which the plaintiff claims compensation. The said rights of the Edison Company do not constitute any part of those rights alleged to belong to the 120 plaintiff, and for which plaintiff seeks to recover compensation against the United States. The United States has not taken, nor does it propose to take, rights of the Edison Company in and to the waters of said San Joaquin River and its tributaries. The said rights of Edison Company to the waters of the San Joaquin River and its tributaries as against the said lands alleged to be owned by the plaintiff now exist and will continue to exist after the alleged taking by the United States of the remaining water rights of the plaintiff.

IV.

The Edison Company operates on the San Joaquin River and its tributaries five hydroelectric generating plants, installed and placed in operation between 1913 and 1929, with an aggregate operating capacity of approximately

400,000 kw. Certain of these plants are operated under permits granted by the Secretary of Agriculture under the Act of Congress of February 15, 1901, and others under the licenses issued under the Federal Water Power Act of June 10, 1920. To provide for the diversion and utilization of water through these plants the Edison Company maintains three storage reservoirs, with approximate capacity of 290,000 acre-feet, together with a series of tunnels and conduits extending many miles through the mountains. All of said works are located many miles upstream from the Friant Dam of the United States, and said Friant Dam is located many miles upstream from the lands of the plaintiff.

V.

One of said reservoirs, the Huntington Lake Reservoir, and Power Houses No. 1 and No. 2 were completed
121 in 1913; the balance of the said works, including two reservoirs and three more power houses, were completed in 1928. Each year since the said works were completed Edison Company or its predecessors have, by means of said works, diverted, stored and used the waters of said San Joaquin River and its tributaries to the extent water was available for the generating of electrical energy at said power houses and certain purposes incidental thereto.

Edison Company alleges that it is the owner of the right to divert, store and use the waters of said San Joaquin River and its tributaries by means of said works for said purposes, by virtue of (a) appropriations by Edison Company under and in accordance with the terms and provisions of the laws of the State of California, (b) the ownership by Edison Company of lands bordering upon and riparian to said streams, (c) the occupancy and use by Edison Company of lands of the United States riparian to said streams under licenses duly issued to it by the Federal Power Commission pursuant to the provisions of the Act of Congress, known as the Federal Power Act, (d) grants to and contracts with Edison Company by owners of lands riparian to the said San Joaquin River and by owners of appropriated rights to the waters of the said San Joaquin River, and (e) the open, notorious, continuous and adverse use by Edison Company of said waters under a claim of right for more than five years.

All of said water rights of Edison Company are prior to and superior to any right of the plaintiff in and to the waters of the San Joaquin River alleged to have been taken by the United States. The lands described in the said

petition herein are subject to all of said rights of Edison Company; said rights are not involved in, and are
122 not the subject matter of, this proceeding and constitute no part of the property of the plaintiff alleged to have been taken by the United States and for which compensation is sought by the plaintiff in this proceeding.

VI.

All of the said water rights of Edison Company, including its rights under the said contracts with said Miller & Lux Incorporated, have been and hereafter will be exercised and enjoyed, and all of the waters of said river and its tributaries aforesaid so diverted, stored and used by Edison Company and its predecessors have been and will be returned to the main channel of the river by Edison Company, at points far above the said Friant Project, except as to certain small amounts of water used incidentally for domestic and other consumptive purposes. The diversion of the waters of said river by the United States by means of the said Friant Project, after the use of said waters by Edison Company and before said waters reach the lands of plaintiff, does not constitute a taking by the United States of any of the rights of Edison Company.

VII.

Edison Company, while claiming to own all of the rights aforesaid and not waiving the same, disclaims any interest in the compensation sought to be recovered by the plaintiff in this proceeding, which is compensation for the taking of certain alleged water rights of the plaintiff which it claims to own subject to the rights of Edison Company.

123

VIII.

Edison Company has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs I, III, VI, VII, VIII, IX, X and XI of said petition, and placing its denial upon such grounds denies each and every allegation therein contained, except as herein specifically admitted or alleged.

IX.

Section 14(b) of Public Law 395 does not grant jurisdiction to the Court of Claims of the United States with respect to the property or other rights of the Southern California Edison Company Ltd. to the waters of the San Joaquin River and its tributaries, or in and to the lands described in the petition herein, or as to the property or other rights of the United States or any other party

to this proceeding as against the Edison Company with respect to the use of the waters of said streams, and said Court of Claims is without jurisdiction to proceed in the above-entitled matter against the Edison Company. Said Section 14(b) of said Public Law 395 is applicable only to proceedings involving the termination of contracts, and the jurisdiction of the Court of Claims is not extended except with respect to that particular matter.

X.

Southern California Edison Company Ltd. has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided and abetted or given encouragement to rebellion against said government.

124 Wherefore, Southern California Edison Company Ltd., respectfully prays that the Court of Claims order that said Company be dismissed from these proceedings, and that the Court take no other action in these proceedings with respect to said Company.

Dated this 19th day of March, 1945.

PETER Q. NYCE,
1266 National Press Bldg.,
Washington 4, D. C.
Attorney of Record for Southern California Edison Company Ltd.

Of Counsel:
GAIL C. LARKIN,
1113 Edison Bldg., 601 W. 5th St.,
Los Angeles 53, California.

Duly sworn to by Peter Q. Nyce.
Jurat omitted in printing. (*All in italics.*)

125 *San Joaquin Light and Power Corporation's Plea to the Jurisdiction With Briefs in Support Thereof—Filed Mar. 21, 1945*

SAN JOAQUIN LIGHT AND POWER CORPORATION appears in the above entitled matter in response to the order made by the Honorable Court therein on January 31, 1945; avers that it was heretofore a corporation organized and existing under and by virtue of the laws of the State of California; that it was finally dissolved by order of the Superior Court of the State of California in and for the County of Fresno on the 21st day of December, 1944, having prior thereto conveyed and transferred all of its properties, both real and personal, to Pacific Gas and Electric Company, and

that it has at all times borne true allegiance
125a to the Government of the United States and has not in any way voluntarily aided and abetted or given encouragement to rebellion against said Government.

San Joaquin Light and Power Corporation now and hereby moves the Honorable Court to revoke said order and to dismiss said corporation from said action on the ground that the Honorable Court did not have jurisdiction to make said order and does not have jurisdiction to make any order concerning said corporation for the following reasons, to wit:

1. San Joaquin Light and Power Corporation conveyed all of its properties and has been dissolved as above stated.

2. The cause stated in plaintiff's petition does not arise under Public Law 395—78th Congress, Chapter 358—2d Session, and said Court was not authorized by Section 14(b) of said Public Law to order additional parties brought in except in cases arising under said Act or necessary to give effect to said Act. This case does not arise under said "Termination of Contracts Act".

3. Neither plaintiff's petition nor defendant's answer thereto shows any interest in or claim by San Joaquin Light and Power Corporation to the or any of the riparian rights of plaintiff or to any funds deposited in escrow by Miller & Lux Inc. Said petition shows that plaintiff owns riparian rights in waters of the San Joaquin River naturally flowing at the lands in the petition described subject to rights granted by Miller & Lux Inc. to San Joaquin Light and Power Corporation to store water above Friant Dam for the use of said corporation for power purposes and subsequent use by Miller & Lux Inc. and others, and such
125b rights of San Joaquin Light and Power Corporation were not and are not included as the basis for any compensation claimed by plaintiff.

4. The storage and use by San Joaquin Light and Power Corporation all occurred above Friant Dam and could not and cannot be interfered with by the storage of water by said dam and San Joaquin Light and Power Corporation is not required to make any claim against the limited rights claimed by plaintiff or any claim against or interest in the fund deposited in escrow as alleged in his petition.

5. The respective rights of San Joaquin Light and Power Corporation and Miller & Lux Inc. and its subsidiaries and affiliated companies and their successors in interest were fully adjudicated and determined in an action brought in the Superior Court of the State of California in and for the County of Fresno in an action involved in an appeal to

the District Court of Appeal of the State of California in and for the Fourth Appellate District (136 Cal. App. 495) and in a further appeal to the Supreme Court of California (8 Cal. (2d) 427), and this Honorable Court has no jurisdiction to review or retry the question of title to any such water or water rights involved in determining the matter of compensation to plaintiff pursuant to his said petition.

ALBERT E. CARTER,
Attorney for San Joaquin Light and Power Corporation.

Of Counsel.
ROBERT H. GERDES,
245 Market Street,
San Francisco 6, California.

126 *San Joaquin Light and Power Corporation's Memorandum on the Facts of the Case in Support of Plea to Jurisdiction*

In his petition plaintiff expressly admits that the riparian rights for which he claims compensation have been reduced by the express exceptions and reservations contained in the grant to him by Miller & Lux Inc. Such exceptions and reservations include rights granted by said Miller & Lux Inc. to San Joaquin Light and Power Corporation to store waters of the San Joaquin River and use the same for power purposes above Friant dam, and neither petitioner nor any other party has challenged the said or any other rights of said San Joaquin Light and Power Corporation. All of the storage and uses of water of the San Joaquin River were made above Friant dam and San Joaquin Light and Power Corporation never claimed or had any rights whatsoever to use any of the waters of said river below said dam. The lands of plaintiff described in its petition are more than fifty miles downstream from Friant dam.

In his petition plaintiff only claims compensation for the taking of such riparian rights as he may presently have and does not show that San Joaquin Light and Power Corporation has ever made any claim to any share in any compensation which may be awarded to plaintiff against the defendant or that it is in any way interested in any amount thereof or would be in any way affected thereby. Neither the petition nor the answer of the defendant shows that San Joaquin Light and Power Corporation is making any claim to or has any interest in the money deposited in escrow by the defendant through the United States Bureau
127 of Reclamation for the purpose of compensating owners of riparian lands situated along the San Joaquin River below said Friant dam.

The rights of the San Joaquin Light and Power Corporation to store water on the upper reaches of the San Joaquin River including its rights under the agreement with Miller & Lux Inc., referred to in the exceptions and reservations in plaintiff's deed from Miller & Lux Inc., were fully adjudicated and established in the case of *Miller & Lux Inc.* v. *San Joaquin Light and Power Corp.*, decided in 136 Cal. App. Rep. p. 495 and 8 Cal. Rep. (2d) 427; and as against the plaintiff and all other owners of riparian lands who derive titles through Miller & Lux Inc., including Miller & Lux, by judgment of the Superior Court of the State of California, in and for Stanislaus County, in the case of *L. A. Vandervort* v. *San Joaquin Light and Power Corp. et al.*, No. 14642.

Even if this court had jurisdiction to require it, a matter we do not concede, it would be unjust and inequitable to compel San Joaquin Light and Power Corporation to appear herein and to meet the burden and expense of proving its former rights to uses of water above Friant dam where it has no interest in the controversy, and benefit of its effort and expense would go solely to the defendant.

San Joaquin Light and Power Corporation's Brief in Support of Plea to Jurisdiction.

Said court did not have jurisdiction under Section 14(b) of Public Law 395—78th Congress, Chapter 358—2d Session, to summon the San Joaquin Light and Power Corporation to assert and defend its rights to the use of the waters of the San Joaquin River as heretofore used and
128 claimed to exist for the reason that the claim set forth in plaintiff's petition does not arise under said Public Law and is not necessary to give effect to said act.

Section 14(B) of said Public Law provides:

"(b) The Court of claims, on motion of either of the parties, or on its own motion, may summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests, if any, in such suit or proceeding, within such period of time prior to judgment as the Court of Claims shall prescribe . . . ."

Section 14(c) of said Public Law expressly limits such extended jurisdiction to matters arising under said Public Law. Section 14(c) of said Public Law provides:

"(c) The jurisdiction of the Court of Claims shall not be affected by this Act except to the extent necessary to give effect to this Act, and no person shall recover judgment on any claim, or on an interest on any

claim, in said court which such person would not have had a right to assert in said court if this section had not been enacted."

A careful reading of plaintiff's petition discloses that his claim, if any, arises under the Fifth Amendment to the Constitution of the United States. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 37 L. Ed. 463; Judicial Code, Section 145, 28 *U. S. C. A.* Section 250.

The jurisdiction of the Court of Claims is confined to the rendition of money judgments against the United States. *United States* v. *Alire*, 6 Wall (U. S.) 573, 18 L. Ed. 947; *United States* 1. Jones, 131 U. S. 1, 33 L. Ed. 90; *United States* v. *Sherwood*, 312 U. S. 584, 85 L. Ed. 1059.

129 While evidence of the extent of the water rights so excepted and reserved may become pertinent to the determination of the amount of just compensation to be paid plaintiff for any taking of his present riparian rights, neither the petition of plaintiff nor the answer of defendant shows that San Joaquin Light and Power Corporation claims any interest in the riparian rights now owned by plaintiff or in any fund deposited in escrow by defendant to compensate plaintiff for the taking of such rights. This court has no jurisdiction to compel San Joaquin Light and Power Corporation to litigate its water rights with the plaintiff in order that the defendant might more readily ascertain the value of the rights remaining in plaintiff and the compensation due to plaintiff for the taking of such rights.

In the case of *United States* v. *Sherwood, supra*, the court said:

"If the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court."

United States v. *Jones*, 131 U. S. 1, 33 L. Ed. 90.
Lynn v. *United States*, 110 Fed. (2d) 586.

If plaintiff had sought to bring into this action the San Joaquin Light and Power Corporation in order to ascertain the extent of his rights, the Court of Claims would be without jurisdiction to try such case.

In the case of *United States* v. *Sherwood, supra*, the court said:

"If its maintenance against private parties is prerequisite to the suit against the United States the suit must be dismissed."

Turner v. *United States*, 248 U. S. 354, 63 L. Ed. 291.

130 *Pac. Mutual Life Ins. Co.* v. *United States*, 44 Fed. (2d) 887.

As the storage of water and the use of the same for power purposes by the San Joaquin Light and Power Corporation cannot be interfered with by the storage of water in Friant dam, and Miller & Lux Inc. could not, even if it had assumed so to do, convey to the defendant the rights theretofore granted to said San Joaquin Light and Power Corporation, there is nothing before the court to indicate that said company has any interest in said fund or any compensation to be paid to the plaintiff for the taking of his riparian rights. The situation is quite unlike that appearing in *Intermingled Cotton Cases*, 92 U. S. 654, where each owner of cotton in the pool had an interest in the common fund derived from the sale of the same.

Miller & Lux Inc. v. *San Joaquin L. & P. Corp.*, 136 Cal. App. 495.

Miller & Lux Inc. v. *San Joaquin L. & P. Corp.*, 8 Cal. (2d) 427.

For the reasons hereinabove stated, it is respectfully submitted that the order of said court made on the 31st day of January, 1945, should be revoked, and the San Joaquin Light and Power Corporation should be dismissed from said action.

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Of Counsel
ROBERT H. GERDES,
245 Market Street,
San Francisco 6, California.

131 *Answer of Plaintiff to Intervening Petition of Miller & Lux Incorporated—Filed March 28, 1945.*

Now comes the plaintiff and answering the intervening petition of Miller & Lux Incorporated, admits, alleges and denies as follows:

I.

Answering Paragraph IV of said petition, plaintiff denies all of the allegations thereof except that he admits and alleges that in the year 1925 intervener initiated an active sales campaign for the purpose of selling its lands, but denies that by any means it offered its lands to
132 the public in two general classifications, lands with water rights, and lands without water rights, but on

the contrary alleges that it entered into numerous different kinds of contracts with numerous and different provisions in regard to water rights. Plaintiff denies that the lands with water rights were crop lands located within the boundaries of the mutual water companies referred to, but on the contrary alleges that much of the lands which were crop lands and within the boundaries of said mutual water companies were sold with limited water rights, and he denies that the lands without water rights, used for the production of wild grasses, include the lands described in plaintiff's petition, and on the contrary alleges that the pasture lands were sold with the water rights that were granted therewith and were a part thereof and which were not reserved and excepted from such grant. Plaintiff admits that there was a sharp differential in selling price between crop lands and pasture lands, but he alleges that the price depended on the character of water right retained by said lands, and that the matter as to what water should go with the land was in all cases a matter of negotiation between the seller and the purchaser.

II.

Answering Paragraph V of said petition, plaintiff denies that the conditions, covenants and reservations therein referred to had the effect of excepting and reserving in intervener, its successors and assigns, its subsidiary companies, and the Southern California Edison Company and the San Joaquin Light and Power Corporation, or any other person,

133 all of the usual, ordinary and normal flows of the San Joaquin River, leaving only the unusual, extraordinary and enemy waters which may from time to time flow in said river; and on the contrary, plaintiff alleges that the said exceptions and reservations left in said river a large amount of the usual, ordinary and normal flows of said river which were highly beneficial to the plaintiff. Plaintiff denies that all of the usual, ordinary and normal flows of said river at all the times mentioned in plaintiff's petition have been and now are put to beneficial use by intervener, said subsidiary companies, or said power companies, and denies that none of said waters have been used by the plaintiff on his said lands.

Further answering said Paragraph V, plaintiff alleges that any levees or dikes which have been constructed on said property were for the purpose of better regulating and controlling the flow of the water of the said San Joaquin River to which the said lands were entitled, in order to make the same most useful and beneficial to said lands.

III.

Answering Paragraph VII of said petition, said plaintiff denies that plaintiff is not entitled to use on the lands described in said petition any waters which the United States of America, pursuant to said aforementioned contract and deed or otherwise, has stored or diverted, or any waters which said United States hereafter proposes to store or divert.

IV.

Plaintiff denies all the allegations of Paragraph VIII of said petition.

134 V.

Further answering said intervening petition, plaintiff alleges that the water which plaintiff claims was heretofore, in litigation between said Miller & Lux Incorporated, the predecessor of plaintiff herein, and Madera Irrigation District, the predecessor of the defendant herein, adjudged not to be unusual, extraordinary or enemy water, but to be the usual and ordinary flow of said river which the owner of said lands, as against the Madera Irrigation District and its successor, the United States of America, was entitled to use and enjoy.

VI.

Further answering said petition, plaintiff alleges that the escrow referred to therein was made for the benefit of the plaintiff and in law inures to his benefit to the extent provided by said agreement creating said escrow.

WHEREFORE, plaintiff prays that intervenor take nothing by its intervention, and that plaintiff recover judgment as prayed for in his petition, and that it be further adjudged that plaintiff is entitled to recover the compensation adjudged to him herein from the escrow referred to in said intervention, to the extent provided by said agreement creating said escrow.

Dated, San Francisco, California,
March 20, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

135 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics.)

137 *Argument and Submission of Cases—*
Jan. 7, 1948.

On January 7, 1948, the cases were argued and submitted on merits together by Mr. Edward F. Treadwell for plaintiffs, and by Mr. Ralph S. Boyd for defendants.

Proceedings after Argument and Submission of Cases.

On March 1, 1948, the court filed findings of fact and conclusions of law, in these cases with opinion by Judge Whitaker.

On April 5, 1948, the court filed an order withdrawing former findings, conclusions of law and opinion, and filing new findings, conclusion of law and opinion which is as follows:

139 *Order.*

On the court's own motion, IT IS ORDERED this 5th day of April, 1948, that the special findings of fact, the conclusion of law, and opinion filed herein March 1, 1948, be and the same are vacated, set aside and withdrawn, and new special findings of fact, conclusion of law and opinion by Judge Whitaker are this day filed. Judgments for plaintiffs are entered as follows:

46009	Gerlach Live Stock Company..... with interest	$10,440.00
46245	J. Sheldon Potter..... with interest	54,343.26
46244	Martin Erreca ..... with interest	2,500.00

* * * * *

46247 Martin Erreca; and Bernard F. Gavin and George D. Coleman, administrators of the estate of Thomas J. Gavin, deceased,— petition dismissed.

The actions as to the interests of the Southern California Edison Company, Ltd., and the San Joaquin Light and Power Corporation are dismissed.

BY THE COURT,

(S) MARVIN JONES
Chief Justice.

141 *Special Findings of Fact, Conclusions of Law and Opinion of the Court by Whitaker, J.*

Filed April 5, 1948.

Mr. Edward F. Treadwell for the plaintiffs. *Messrs. Treadwell & Laughlin* were on the briefs.

Mr. Ralph S. Boyd, with whom was *Mr. Assistant Attorney General A. Devitt Vanech*, for the defendant.

The facts necessary to a decision of these cases are set out in the opinion; they are set out more in detail in the following

SPECIAL FINDINGS OF FACT

1. The Central Valley of California, approximately 450 miles in length, lies between the Sierra Nevada
142 mountains on the east and the fringe of indistinct mountain chains along the ocean on the west. The northerly two-fifths of the valley known as the Sacramento Valley, is drained by the Sacramento River system, and the southerly three-fifths, known as the San Joaquin Valley, is drained by the San Joaquin River system. The Sacramento River flows south and the San Joaquin flows northwest. Both empty through the same large delta into Suisan Bay, an arm of San Francisco Bay. The controversies in these cases center around the right to the use of water of the San Joaquin River.

THE SAN JOAQUIN RIVER AND ITS FLOOD PLAIN

2. The San Joaquin River is a natural watercourse, with well-defined channels and banks and with its source in the Sierra Nevada Mountains. It flows thence westerly to the plains of the San Joaquin Valley, which it enters at a point known as "Friant," the site of defendant's storage and diversion dam, whose effect upon the waters of the river is the basis of plaintiffs' claims in these actions. From this point, the river continues westward approximately 40 miles to a point in the valley near the town of Mendota, where it is joined by the Fresno Slough of Kings River. It then turns abruptly toward the north and flows in a northwesterly direction until it reaches San Francisco Bay. Certain tributaries empty into the San Joaquin between Friant and the lands of the respective plaintiffs and contribute water in varying amounts to the river's flow.

3. In its course through the mountains and foothills and for some distance after it reaches the valley floor, the banks of the San Joaquin are so high as to preclude overflow, but after the river reaches a point known as Gravelly Ford, about 27 miles west of Friant, the banks become relatively low. In a state of nature and during periods of high or flood water, the river flowed out of its banks at places below this point and over and upon certain of the land on either side of the river, either directly or after flowing into sloughs or branch channels. Certain of the lands so overflowed were moistened, enriched, and fertilized
143 by the overflow and, as a result, produced increased amounts of beneficial vegetation, except in the case of infrequent floods of unusual extent.

In the area of such overflow, the river flowed through numerous side-channels, branch channels, reaches of backwater, and sloughs, in addition to the main channel, such extra channels being referred to generally as "sloughs."

Some of the sloughs form networks; some have dead ends; some receive only backwater, and some receive water from the river and return it to the river at lower points, either directly or through connecting sloughs. Some sloughs branch off other sloughs. Some carry river water whenever there is water in the main channel; others carry river water only at higher river stages.

4. In the vicinity of the lands described in plaintiffs' petitions, the San Joaquin River, in a state of nature and at the lowest stages of flow, was confined by natural banks to a sandy channel between lands which were granted to the State of California as swamp and overflow lands under the Swamp Land Act of September 28, 1850, ch. 84, 9 Stat. 519. This channel, except during stages of higher flow, hereinafter described, contained the water flowing in the river and is referred to as the "low channel."

Within a few years after the passage of that act, the lines segregating such swamp and overflow lands from the adjoining higher lands were surveyed and platted by the United States. In substance, the surveyed line of segregation marked certain natural banks at various distances from the low channel banks of the river. At higher stages of the river in every year of ordinary flow, the waters spread over the swamp and overflow lands, and for a time were confined to a wider channel by such natural banks, which were substantially the outer boundaries of the lands granted as swamp and overflow. This wider channel is referred to as the "high channel."

In every year of ordinary flow in a state of nature the river rose still higher, so that its waters were no longer confined to the high channel. The waters so overflowing the high channel banks and into and over the upland area moved slowly in the same general direction as the flow of the river in the low and high channels. This wide
144 overflow was confined by rising ground on each side of the general overflow basin of the river. This is referred to as the "overflow channel."

The flood plain described in this and the preceding finding extends approximately from Gravelly Ford to a short distance below the confluence of the San Joaquin with the Merced River.

The natural flow of the river has been and is variable in quantity, both over the years and in periods within the years. In the spring and summer the river is fed by the melting snow pack of the Sierra Nevada Mountains and in the winter season by rainfall, supplemented by a small amount of snow-melt in the lower reaches of the mountains.

As a result there have been two periods of high water, the winter rain flood usually in December, January, and February, and the spring or summer snow-melt overflow usually in April, May, and June, with considerable variance in the times of commencement, duration, and the times of peak flow.

5. The lands described in the petitions of plaintiffs J. Sheldon Potter, Martin Erreca, No. 46244, and Martin Erreca, *et al.*, No. 46247, border the main channel. Such lands, as well as those described in the petition of Gerlach Live Stock Company, are penetrated or traversed by certain of such sloughs and are affected by the water flowing therein, or in the main channel, or by both, in the manner more fully set forth hereinafter.

The relative locations of the lands owned by the respective plaintiffs herein, proceeding in the downstream direction, are as follows: J. Sheldon Potter, the two Errecas, and Gerlach Live Stock Company.

6. Mariposa Slough, also called Hardpan Slough, leaves the east bank of the river through multiple headings upstream from the lands described in the petition of J. Sheldon Potter. As it flows in a northwesterly direction, its course diverges from that of the river at an angle of about 20°. When it reaches the Potter land, it becomes a portion of the northeastern boundary thereof. It continues in
145 the same general direction until it is intersected by the East Side Canal, hereinafter more fully described, at a point designated as Little Sand Spillway, a control gate which permits water to flow out of the canal into the continuance of the slough. From this point the slough crosses the northeast corner of the lands described in the petition in Martin Erreca, *et al.*, No. 46247. About a mile and a half to the west, it reenters such Erreca lands through the north boundary thereof and empties into Chamberlain Slough, hereinafter described.

A northern branch of Mariposa Slough, sometimes called Deep Slough, leaves East Side Canal approximately two and one-fourth miles down the canal from Little Sand Spillway, at a point designated as Three Bridges Spillway. This Branch runs thence northwesterly until it empties into Bear Creek, a natural watercourse which flows into the San Joaquin River from the east, down river from the lands involved in these four actions.

7. Chamberlain Slough, sometimes called Sand Slough, is a branch channel of the San Joaquin River. It branches from the east bank of the river downstream from the head of Mariposa Slough, and about a half mile upstream from the southeast limits of the land described in the petition

J. Sheldon Potter. A short distance inside the Potter east boundary, Chamberlain Slough branches into two channels. The eastern branch flows northerly and empties into Mariposa Slough in the reach where the latter slough bounds the Potter land on the northeast. The western branch of Chamberlain Slough crosses the westerly portion of the Potter land, roughly paralleling the river. It is intersected by the East Side Canal at the west end of the Potter land and is utilized as a channel for the Canal for about a mile to a point designated as "Big Sand Spillway." The Canal leaves the slough at that point. Chamberlain Slough turns at a right angle to the west and crosses the Martin Erreca, *et al.*, No. 46247, land in a westerly and northerly direction. In the western part of such Erreca land it is joined by Mariposa Slough and returns to the river about a half mile beyond the Erreca west boundary. Both Mariposa and Chamberlain Sloughs have a number of minor branches.

146

The sloughs are not known in the vicinity by the same names to all persons familiar with them and much confusion results because of this fact, even on maps. Chamberlain Slough, where it crosses the Martin Erreca, No. 46247, land is sometimes called Mariposa Slough, and was so referred to in the Haines decrees hereinafter mentioned.

8. At the downstream end of the Potter land a large artificial channel known as East Side Canal takes out of the east bank of the river. It was constructed for the purpose of conveying San Joaquin River water to irrigate lands some distance north of those involved in these four actions. It extends from the river approximately 20 canal-miles in a northwesterly direction, roughly paralleling the river at distances of 2 to 4 miles. The first mile and a quarter of the East Side Canal is an artificial channel. The canal then intersects and utilizes the channel of Chamberlain (or Sand) Slough. After approximately a mile, Chamberlain Slough veers to the west, and from that point the Canal continues in an artificial channel. Control gates at points where the canal intersects sloughs or streams provide for the regulation of the flow so that water may be confined to the canal, spilled into the sloughs or streams, or both, as may be determined from existing conditions.

PRIOR APPROPRIATIVE AND PRESCRIPTIVE RIGHTS.

(a) *Miller & Lux Incorporated and Its Subsidiaries.*

9. Miller & Lux Incorporated is and at all times here involved was a corporation organized and existing under the laws of the State of Nevada and doing business in the State of California.

Prior to any of the times here involved, Miller & Lux Incorporated became the owner of large areas of land, beginning with a narrow strip at Gravelly Ford and extending in varying widths down the San Joaquin Valley to approximately the junction of the Merced River with the
147 San Joaquin River, among which lands were those described in the petitions of the plaintiffs in these four cases. Plaintiffs became the owners of the lands described in their petitions as successors to Miller & Lux Incorporated, by either direct or mesne conveyances. A large portion of the lands owned by Miller & Lux Incorporated, including those described in the petitions of the plaintiffs herein, was riparian to the San Joaquin River, or to sloughs or branch channels thereof, and in some instances to both.

10. At the respective times here involved, San Joaquin & Kings River Canal & Irrigation Company, Gravelly Ford Canal Company, Columbia Canal Company, Firebaugh Canal Company (formerly Panoche Canal Company), and San Luis Canal Company were corporations subsidiary to Miller & Lux Incorporated, which owned all or a majority of the stocks of each of such subsidiaries and had the controlling interest in each of them.

Prior to any of the times here involved, such subsidiary corporations, with the consent of and under agreements with Miller & Lux Incorporated, constructed certain canals and works and thereby diverted and appropriated large quantities of the water of the San Joaquin River for the irrigation of lands riparian to the San Joaquin River owned by Miller & Lux Incorporated, and also for the irrigation of lands non-riparian to the San Joaquin River owned by Miller & Lux Incorporated and by other persons.

Also prior to any of the times here involved and in addition to the foregoing diversions, Miller & Lux Incorporated constructed certain canals and works and thereby diverted and appropriated waters of the San Joaquin River for the irrigation of lands owned by it, both riparian and non-riparian to the San Joaquin River.

11. A large part of the water so diverted and appropriated by Miller & Lux Incorporated and by its subsidiary companies was appropriated and diverted and was and is used for the irrigation of croplands. A large part also was diverted and appropriated and was and is used for the purpose of irrigating grass or pasture lands through the medium and under the control of canals, ditches,
148 levees, and other works. Such grasslands are referred to as "controlled grasslands."

In addition to the croplands and controlled grasslands so irrigated, Miller & Lux Incorporated owned lands of another character riparian to the San Joaquin River, its branches and sloughs, including the lands described in the petitions of the plaintiffs herein. During the periods of spring and winter high water or floods, the waters of the San Joaquin River flowed by and over and upon such grasslands by means of the main channel, and branch channels and sloughs, and enriched and moistened such lands, and caused them to produce increased amounts of pasturage, and provided water for cattle and other livestock. Lands so watered are referred to as "uncontrolled grasslands."

12. The diversions mentioned above were upstream from the lands described in plaintiffs' petitions and the parties to these actions do not dispute that the rights founded on these diversions and the use of the water so diverted are entitled to be satisfied out of the waters of the San Joaquin River before the plaintiffs in these four cases are entitled to the use of any waters of the San Joaquin River. Because of the variability of the flow, satisfaction of these rights and of other undisputed prior rights hereinafter mentioned require the entire supply of water in the river at certain times of the year, and at all times of the year in some years of exceptionally low water.

13. The greater part of the water so diverted was and still is diverted by means of two dams across the San Joaquin River upstream from the lands and sloughs involved in these four cases.

The first is at a point near Mendota, a short distance below the confluence of the San Joaquin River and Fresno Slough of the Kings River. The dam in its original condition was built in 1871 by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, under contract with Miller & Lux Incorporated, for the purpose of diverting San Joaquin water into several large canals heading immediately above the dam, and has been progressively maintained, improved, and replaced by Miller & Lux
149 Incorporated for that purpose ever since. It was not built for and is not used for storage purposes. As an incident to raising the level of the water for the purpose of diversion, a certain amount of channel storage resulted. It does not appear that the amount of water thus stored was more than a relatively negligible amount, or that it was utilized as stored water, or for any purpose other than maintaining the level necessary for diversion.

The second principal point of diversion is at "Sack Dam," so named because it was rebuilt yearly for many years with brush and sacks of earth, at the head of Temple Slough.

which branches off the west side of the river about 19 miles downstream from the Mendota Dam. More recently the dam has been rebuilt with loose earth thrown up by bulldozers. It was originally built by Miller & Lux Incorporated about 1873, and is rebuilt annually for the purpose of diverting San Joaquin River water to irrigate land west of the river.

Each year when the flow of the river drops to a point where it is necessary to take all the flow at Temple Slough to satisfy the prior appropriative and prescriptive rights, Sack Dam is rebuilt. This occurs most frequently in June and July. Usually, the dam is maintained in place until October, November, or December. During the time it is so maintained, except for immaterial interruptions, all the water remaining in the river at that point is diverted and plaintiffs do not receive and are not entitled to receive any material amount of water from the river.

(b) *Uncontested Alteration of River Regimen by Power Companies*

14. During the period from 1895 to 1928, Southern California Edison Company Ltd. and San Joaquin Light and Power Corporation, or their predecessors, constructed dams and reservoirs in the San Joaquin River basin above Friant Dam and stored water in the reservoirs and released and regulated the flow of the waters through a series of power plants. Beginning in 1906, Miller & Lux Incorporated and its subsidiaries entered into numerous contracts with the two power companies, or their predecessors, by the terms of which it was agreed generally that, subject to certain limitations as to times and quantities, the two companies might store waters of the San Joaquin River System during comparatively high stages of the flow, and use the stored water for the production of power and return it to the river above the lands owned by Miller & Lux Incorporated during lower stages of the flow.

The effect of such operations has been to reduce the amount of the flow in periods of high water and to increase the amount of the flow during periods of low water. As new reservoirs were put into operation during these years, the regimen of the river below Friant was materially and progressively altered.

The parties do not dispute that the relative rights of the plaintiffs in these four cases to the use of the waters of the San Joaquin River are limited to the flow of the river as altered by operations of the power companies under the agreements above-mentioned.

15. There is no controversy in these actions between the Southern California Edison Company Ltd. and the San

Joaquin Light and Power Corporation, or between either of the two power companies and any other party to these actions, concerning the storage and use or the right to store and use the waters of the San Joaquin River by either of the two power companies, as above described. Neither of the two power companies has any interest in the matters in controversy between other parties to these actions and neither claims any part of the compensation sought to be recovered by any of the plaintiffs.

All parties in the case of *J. Sheldon Potter* v. *United States*, No. 46245, and *Martin Erreca* v. *United States*, No. 46244, in which cases the two power companies were joined as parties by order of the Court, have stipulated that these actions may be dismissed as to the two power companies, without prejudice.

(c) *Rights adjudicated by the Haines decrees and other prior rights*

16. Commencing about the year 1916, certain individuals, organizers of Madera Irrigation District, formulated
151 a plan for the establishment of an irrigation district for the irrigation of certain land north and east of the San Joaquin River. This plan contemplated the construction of a dam on the San Joaquin River at the same place where the United States has since constructed Friant Dam, hereinafter mentioned, and the storage and diversion of San Joaquin River water to irrigate land in the District.

The District, when organized, comprised 170,000 acres of land. The District obtained title to lands necessary for the construction of the dam, and it and its predecessors filed applications with the Division of Water Resources of the Department of Public Works of the State of California, pursuant to the laws of that state, to appropriate certain of the unappropriated waters of the San Joaquin River for the irrigation of land within the District. Thereafter, by an instrument in writing dated January 29, 1940, the Madera Irrigation District conveyed to the United States the lands so acquired, together with:

> All right, title, and interest of the District in and to all water rights, and all of its rights to the use of water of whatsoever kind or nature, whether rights by appropriation, prescription, or by virtue of said District's ownership of riparian lands, in, to, or upon, and from the San Joaquin River, its tributaries, channels, and sloughs, including the ordinary and extraordinary flows thereof and including the right to store any of said water together with the right as against said District,

and as against said District only, its successors and assigns, to impound, store, and divert all of said water for use within or without the watershed of said rivers. It is the intention of the District by this deed to grant, bargain, sell, convey, and confirm unto Grantee all of the District's right, title, and interest of every kind and character in and to any of the waters of, and its right to store, divert, and use, and as against said District, and against said District only, the right to store, divert, and use within or without the watershed of said river, any of the waters of the San Joaquin River, including its tributaries, channels, and sloughs, but excluding those tributaries which drain into said river below Mendota Dam, located in Section 19, Township 13 South, Range 15 East, M. D. B. & M.

Said rights herein granted include but are not limited to the rights acquired by virtue of the following
152 applications of the District to appropriate water from the San Joaquin River, on file with the Division of Water Resources of the State of California, pursuant to the provisions of the Water Commission Act (Chap. 586, Statutes 1913, as amended):

Application number	Date of filing	Amount of direct flow, second feet	Amount of storage, acre-feet
234	Jan. 19, 1916	3,000	500,000
1465	Sept. 26, 1919	3,000	500,000
2792	Mar. 13, 1922	9,000	600,000

Plaintiffs contend that under the doctrine of *res judicata*, the defendant, as the successor in interest to Madera Irrigation District, is bound by determinations of fact and law in three cases hereinafter mentioned in which Madera Irrigation District was party defendant and Miller & Lux Incorporated and certain of its subsidiaries were parties plaintiff.

17. Prior to the execution and delivery of the deed described in finding 16, Miller & Lux Incorporated and two of its subsidiary companies commenced three actions in the Superior Court of the State of California, in and for the County of Fresno. In one of the actions, No. 25729, *Miller & Lux Incorporated* was plaintiff and *Madera Irrigation District* and certain individuals were defendants. A decision, consisting of findings of fact and conclusions of law, was rendered in that case on January 4, 1933, and a decree was entered in accordance with such decision on January 26, 1933. In the second action, No. 25730, the *San Joaquin &*

Kings River Canal & Irrigation Company, Incorporated (successor to San Joaquin & Kings River Canal & Irrigation Company) was plaintiff, and *Madera Irrigation District* and certain individuals were defendants. A decision was rendered in such action on January 4, 1933, consisting of findings of fact and conclusions of law, and a decree was thereafter entered in accordance with such decision. In the third action, No. 25731, *San Luis Canal Company, a Corporation*, was plaintiff and *Madera Irrigation District* and certain individuals were defendants. A decision in this case was rendered December 31, 1932, and a decree
153 was thereafter entered in accordance with such decision. These decisions and the decrees entered upon them are referred to in the evidence herein as the "Haines decrees," so called because they were rendered by Honorable Charles C. Haines, Judge of the Superior Court.

18. In the decisions mentioned above the following adjudications were made:

(a) That certain land of Miller & Lux Incorporated was riparian to the San Joaquin River and to its branches and channels, and that Miller & Lux Incorporated was entitled to all the rights of a riparian owner with respect thereto.

Such land included all the land described in the petitions of the four plaintiffs herein.

(b) That all land which was within the flood plain of the river and in a state of nature was customarily overflowed by the water of the river, including all land returned as swamp and overflow land, was riparian to said river, and was entitled to the rights of a riparian owner with respect thereto.

Such land included all lands described in the petitions of the four plaintiffs herein.

(c) That all sectional parcels of land made fractional by the segregational line between the swamp and overflow land and the upland which bordered upon and were touched by waters of the San Joaquin River customarily flowing over the swamp and overflow land within the flood plain were riparian to the San Joaquin River and were entitled to all the rights of a riparian owner with respect to the water of said river.

(d) That at and along and in the vicinity of the segregational line between the swamp and overflow land and the upland, there existed a secondary bank to the San Joaquin River, and that all land adjacent to such bank and adjacent to and touched by the water confined by such bank was riparian to the San Joaquin River and was entitled to all the rights of a riparian owner with respect to the water of the river.

(e) That the water of the San Joaquin River overflowing the swamp and overflow lands causes water to percolate into the said lands, and to reach the water table under said lands, and to increase the height of the water
154 table under said lands, and to cause the formation of a body of water which flows in the same general direction as the water in the surface channel of the river, and to constitute an underground water supply which is beneficial to said land, and in which the owners of the land have all the rights of riparian owners.

(f) That the high or flood flows of said river in the winter, spring, and summer were highly beneficial for the production of grass and pasture, and that all of the flow of said river, including the high or flood flow in the winter, spring, and summer, was a part of the natural and ordinary flow of said river to which Miller & Lux Incorporated was entitled, with the exception of flows in excess of 20,000 second-feet at any one time, or in excess of 3,000,000 acre-feet in any one year; that flows in excess of those amounts are infrequent, extraordinary, and unusual, and are not a part of regular and customary flow of the water of the river.

(g) That the appropriations made by the Madera Irrigation District were invalid and ineffective, as against the rights of Miller & Lux Incorporated to the full flow of the stream for the purpose of fertilizing and irrigating the lands of Miller & Lux Incorporated, except with respect to flows in excess of 20,000 second-feet at any one time or in excess of 3,000,000 acre-feet in any one year.

19. In the decision in the case of *Miller & Lux Incorporated* v. *Madera Irrigation District*, No. 25729, there were also specific findings in relation to the lands of each of the plaintiffs herein. These findings are hereinafter referred to separately in connection with the separate claims of each of plaintiffs.

20. The *Haines* decrees also adjudicated that Miller & Lux Incorporated and its subsidiary companies had appropriated certain quantities of water for the irrigation of the land there involved, including crop land and controlled pasture land, and that such diversion, appropriation, and use had continued adversely to all the world for more than five years; that Miller & Lux Incorporated and its subsidiaries had acquired thereby a prespective right to the use of the water so appropriated, and that Miller & Lux, Incorporated and its subsidiaries were the owners by prescription and appropriation of the rights so defined in the decrees. These rights were expressed in terms
155 of cubic feet per second, but, except in two instances,

with a limitation as to the total diversion in terms of acre-feet per year.

The descriptions by which such appropriative and prescriptive rights are known, with the maximum rates of flow and maximum quantities of water, are included in the list of prior rights set forth in finding 21.

A cubic foot per second, also called a second-foot, is the rate of discharge flowing in a channel of a rectangular cross-section one foot wide and one foot deep at an average velocity of one foot per second. Water flowing at the rate of one cubic foot per second for 24 hours will produce a volume of water equal to approximately 2 feet in depth covering one acre, or two acre-feet.

21. On October 20, 1941, and for a long time prior thereto there existed a number of appropriative and prescriptive rights which were entitled to be satisfied out of the waters of the San Joaquin River flowing past Friant before the riparian rights of the lands described in the petitions of the plaintiffs in these four actions became entitled to the use of any such water. In the *Haines* decrees, Miller & Lux Incorporated and certain of their subsidiaries were adjudged to be the owners of some of such rights.

The material appropriative rights adjudicated in the *Haines* decrees are identified and the maximum quantities to which they were adjudicated to be entitled are as follows:

Name	Maximum cubic feet per second	Yearly maximum acre-feet
Case No. 25729, Miller & Lux Incorporated, plaintiff:		
Aliso Canal (diverted from head of Aliso Slough)	302	59,784
Chowchilla Canal (diverted from Lone Willow) Slough)	120	49,300
Columbia Canal (diverted through Lone Willow and Brown Sloughs)	150	45,374
Lone Willow Slough, Aliso Slough, Brown Slough (diverted through various weirs, dams, and other works)	313	61,907
Temple Slough	463	157,296
San Joaquin Canal (diverted by Miller & Lux through canals of San Joaquin & Kings River Canal & Irrigation Co.)	285	128,294
Mowry Slough (Little San Joaquin)	26	5,218
Borland Ranch	14	7,580
Pick Anderson Slough (diverted by canals taking out of Pick Anderson Slough and by dams and levees in and along said slough and its branches)	88	17,600
Orestimba Grant (diverted through Poso, Temple, Santa Rita, Pick Anderson, and other sloughs by weirs, dams, and levees in and along said sloughs)	264	52,264
Case No. 25,730, San Joaquin & Kings River Canal & Irrigation Co., Incorporated (diverted through Main Outside, and Helm Canals and Helm Ditch)	1,360	512,730
Case No. 25,731, San Luis Canal Co. (now known as Helm Canal)	540	176,388

156 In the instance of the Chowchilla right, the *Haines* decrees did not fix a maximum yearly number of acre-feet. The yearly maximum stated above is computed in accordance with use, agreements, and the *Haines* decrees. It is also very close to the figure reached by multiplying the acreage served (13,700) by a water duty of 3 acre-feet per acre, plus loss of water in transportation, estimated at 20%. This right was originally owned equally by Miller & Lux Incorporated and Chowchilla Farms, Incorporated. Prior to the time of its transfer to the United States, as hereinafter shown, it became owned entirely by Miller & Lux Incorporated.

In the instance of the Columbia Canal, the diversions in cubic feet per second allowed by the decree varied month by month from a low of 40 cubic feet per second during the months of October to February, inclusive, to a maximum of 150 cubic feet per second during June.

In the instance of Temple Slough, the diversions in cubic feet per second allowed by the decree varied from month to month from a low of 26 cubic feet per second during the month of December, to a high of 463 cubic feet per second during the month of June.

In the instance of the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, the diversions in cubic feet per second allowed by the decree varied from month to month from a low of 100 cubic feet per second during December, to a maximum of 1,360 cubic feet per second during the months of May to August, inclusive.

There has not been sufficient evidence introduced to fix the existence, extent, and relative priorities of the appropriative and prescriptive rights adjudicated in such decrees without evidentiary value of the decisions and judgments themselves. Plaintiffs offer the *Haines* decrees as defining both the appropriative and riparian rights. Defendant contends that the owners of appropriative or prescriptive rights described in the *Haines* decrees have, since the decrees, acquired by appropriation and prescription the right to divert quantities of water beyond the limits stated in the *Haines* decrees. There is not sufficient evidence to sustain such contention by defendant, and it is found that on October 20, 1941, the appropriative
157 and prescriptive rights specified in such decrees were of the extent and subject to the limitations therein defined.

On October 20, 1941, and for a long time prior thereto, other subsidiaries of Miller & Lux Incorporated and other diverters had additional appropriative and prescriptive rights which were entitled to be satisfied out of the waters

of the San Joaquin River flowing past Friant before the riparian rights of the lands described in the petitions of these four plaintiffs became entitled to the use of any such water. The names by which such rights are identified and the limits of such rights are as follows:

Name	Maximum cubic feet per second	Maximum yearly acre-feet
Gravelly Ford Canal Co	600	39,314
Firebaugh Canal Co	300	68,025
James and Tranquillity Irrigation Districts		29,300
Blythe Canal		11,600
Edison Securities Cos		6,100

There were also lands irrigated from the waters taken from the San Joaquin River between the headworks of the Gravelly Ford Canal and Friant Dam. The rights to the use of such waters are prior to the riparian rights of the lands described in the petitions in these four cases. Plaintiffs concede that the amount of water to which such rights are entitled is 30,464 acre-feet per year.

Such prescriptive and appropriative rights are entitled to receive a maximum of 1,458,538 acre-feet of water in the aggregate, before the riparian rights of the lands described in the petitions of the plaintiffs become entitled to the use of any of the water of the San Joaquin River.

THE WATER SUPPLY AND THE SURPLUS AVAILABLE TO PLAINTIFFS

22. Among other factors, the extent and the value of the riparian rights of the lands described in the petitions of plaintiffs herein depend upon the quantity of water which reasonably may be expected to become available for use on such lands in times subsequent to the time of such valuation.

158 Because of the substantial variation from year to year and from month to month in the quantity of water discharged by the river, the amount of water which may be discharged in any future month, year, decade, or score of years cannot be predicted with any assurance of approximate accuracy. It is, however, customary to use the record of past discharges for the purpose of making estimates of the future discharge of streams.

In 57 of the 68 water years between 1879 and 1946, both inclusive, in which the discharge of water is computed from measurements, the average yearly discharge was 1,811,082 acre-feet.

23. In any year here involved, owners of appropriative or prescriptive rights below Friant Dam and upstream

from plaintiffs were and are entitled to the use of a maximum of 1,458,538 acre-feet of water (finding 21). Deducting the amount of the prior appropriative or prescriptive rights from the average yearly discharge of 1,811,082 would give an average yearly surplus of 352,544 available for use on lands having riparian rights. The records of water actually diverted show that the prior appropriators, in the aggregate, do not divert and put to use as much water as authorized by the rights listed in finding 21. In the period 1932-1944, inclusive, the highest aggregate diversion was 1,020,516 acre-feet, and the yearly average diversion 870,940 acre-feet.

Actually, there were few years when the discharge was approximately that of the yearly average. In many years the excess on the yearly average ran high and in many years the deficiency dropped low. In some of the low years, the discharge was less than the aggregate of maximum diversion to which prior appropriators were entitled.

24. Yearly discharges varied in volume from a high of 5,211,000 acre-feet in 1886 to a low of 507,000 acre-feet for the year 1924. By ten-year periods, the average yearly discharge was as follows:

Years:	*Yearly average in acre-feet*
1937-1946, inclusive	2,030,300
1927-1936, inclusive	1,286,200
1917-1926, inclusive	1,463,700
1907-1916, inclusive	2,210,044
1897-1906, inclusive	1,799,157
1887-1896, inclusive (estimated)	1,952,870
1879-1886, inclusive (8 years)	2,476,125

159. During each of such ten-year periods, the discharges for separate years varied widely.

25. As the flows actually occurred, there were times of the year when, as a matter of right, the owners of appropriative and prescriptive rights, without reaching or exceeding their maximum limits in cubic feet per second, diverted substantially all of the water of the stream, leaving no surplus for downstream riparian owners. At other times, the discharge exceeded the capacity of the diversion works of such appropriators and their requirements for use, as well as exceeding the maximum limit in cubic feet per second under their rights. At such times a surplus flowed down the river to become available for use by riparian owners.

The discharge is not uniform throughout a year, nor do the relative discharges for the months within the year re-

main constant. The highest monthly discharge during the year usually occurs in May or June, although occasionally it occurs in April or August. The yearly cycle, with its variability, is illustrated by the following table showing the percentage of the yearly total discharged each month:

Month	Monthly percentage for the year 1945.	Average monthly percentage for the period 1905-45, inclusive
January	3.116	4.123
February	8.581	5.326
March	7.642	7.543
April	12.242	11.074
May	15.045	16.356
June	12.561	15.703
July	11.149	25.356
August	8.451	4.414
September	6.085	2.757
October	5.370	2.389
November	4.621	2.116
December	5.137	2.843

26. During the irrigating season each year, when the discharge has dropped below the amount required to satisfy the appropriative or prescriptive rights upstream from plaintiffs, and such prior rights take all the water of the river, the final downstream diversion is made at the head of Temple Slough, where a temporary dam, heretofore referred to as "Sack Dam," is placed across the river.

A chart showing the dates when the dam was put
160 into operation each year for the period 1926-1945, is in evidence. The times the dam was put into operation corresponded with the times following the peak of the spring flood, when the discharge decreased to a point where it became necessary to take the whole flow for the use of the prior appropriative and prescriptive rights.

The period shown by such chart included some years of exceptionally high and some years of exceptionally low discharges, as well as several years in which the discharge approximated the long-time yearly average. In the absence of a complete record of the dates on which Sack Dam was annually installed, the chart for this period is accepted as indicating the times the dam was installed in other years under approximately similar discharge conditions.

27. Not taking into consideration temporary installations or unsubstantial interruptions in maintenance, Sack Dam was installed at the following times in the twenty-

year period 1926-1945, inclusive, and all water of the San Joaquin River flowing at the site thereof was diverted from the river for the remainder of the irrigating season (except for an immaterial amount of seepage and a small quantity permitted to pass through a fish weir in the years 1944 and 1945):

Period during which dam installed:	*Number of years out of 20 the dam was installed in the period specified*
Between February 1-15, inclusive	1
Between March 1-15, inclusive	3
Between March 16-31, inclusive	1
Between May 16-31, inclusive	1
Between June 16-30, inclusive	2
Between July 1-15, inclusive	6
Between July 16-31, inclusive	2
Between August 1-15, inclusive	3
Between August 16-31, inclusive	1

Comparison of these dates with the records of annual discharges show that, in general, the higher the average annual discharges of the river, the later in the year was Sack Dam installed.

28. The records of diversions also show that there is a period in every year, usually commencing in October, November, or December, when Sack Dam is discontinued for the water year. Such period of open flow ends the next summer when there is no longer an excess of water over the requirements of the prior appropriative and
161 prescriptive rights, and Sack Dam is reinstalled.

Generally, this open period commences just prior to the winter rains, when the discharge of the river is relatively low, but the demand for water is even lower. The excess of supply over demand continues through the rising volume of discharge caused by the winter and spring floods. It continues through the peak of the spring floods and is cut off by the installation of Sack Dam as the high discharges from the spring floods begin to subside. It is only during this period that water is available for use under downstream riparian rights.

However, the downstream riparian lands are not irrigated by such water throughout the whole period of such surplus, but only during a relatively short period at the peak of the spring floods, except in years of exceptionally low water, when the spring floods flow over and upon the grasslands described in the petitions of plaintiffs and moisten and enrich them, as hereinafter stated, and benefit and increase the growth of grass and other forage.

During the whole period in which a surplus passes the site of Sack Dam, water of the river becomes available to

riparian owners for domestic use and for the purpose of watering livestock, but it is not satisfactorily established that such uses contribute substantially to the value of the riparian rights. The only substantial benefit is that derived from the moistening and enrichment of the soil by flooding during the relatively short period in which the spring flood reaches such proportions that the lands described in plaintiffs' petitions are overflowed.

As the water flows over the lands of plaintiffs, some of it is absorbed, but the larger part flows on and eventually discharges into Suisan Bay and is not utilized for irrigation. Its flow into the Bay has some effect in repelling the encroachment of salt water into cultivated and cultivable lands on the delta and thus maintaining the usefulness for agricultural purposes. There is no evidence making an exact or approximate evaluation of the use of such surplus water for this purpose.

29. Grasslands in the vicinity and of the kind here involved can utilize approximately 3 acre-feet per acre per year with maximum benefit. The use of less water
162 per acre is beneficial but to a less degree. The use of more water per acre is detrimental.

The quantity of water per acre applied to the irrigation of controlled crop and grasslands is capable of determination with relative accuracy, since the flow can be controlled, measurements can be taken in regulated diversion and distribution works, and the amount of waste computed. However, the quantity of flood water beneficially utilized on uncontrolled grasslands cannot be so measured. After a few hours of flooding, the soil becomes saturated and can absorb no more water. Any additional water flows away, returns eventually to the river, and is lost so far as the flooded land is concerned. The amount of water absorbed depends upon factors which may differ at relatively short distances, among which factors are the depth and the character of material which constitutes the soil. The amount of such absorption, however, is probably under one acre-foot per acre from one flooding. Notwithstanding lack of means to measure the absorption, the flood waters in fact promote the growth of grass and other forage, and the market value of the land with and without the benefit of such growth can be determined.

30. The right of a riparian landowner to the use of water from a stream is not absolute, but must be correlated with similar rights of other riparian owners. There are in the flood plain of the river, described in findings 3 and 4, a large number of acres of riparian uncontrolled grasslands, including that described in the petitions of plain-

tiffs, which lands are entitled to share in the surplus water after prior appropriative and prescriptive rights have been satisfied. Downstream from the flood plain here involved are other riparian lands and also some streams flowing into the San Joaquin River from the east side. The quantity, extent, claims, and adaptability of such lands to irrigation are not disclosed by the evidence.

The utilization of the surplus flood waters by such downstream lands is not shown, but the larger part of the flood waters, supplemented by accretions from east side streams, passes these lands without being diverted or utilized. The only plan for utilization of such flood waters disclosed by the record is that of defendant, hereinafter described, the diversions under which plan will not serve such riparian owners downstream. There is no evidence of past use by, or of any plan for the future benefit of, the downstream riparian owners, which is impeded or diminished by the customary flooding of plaintiffs' lands as herein stated.

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31. The deeds by which Miller & Lux Incorporated conveyed lands involved herein to Martin Erreca, Case No. 46244, and the predecessors in interest of Gerlach Livestock Company, each contained a reservation, hereinafter quoted in full in findings 59 and 79, to the effect that, among other things, the riparian rights of the lands so conveyed shall be subject and subordinate to the riparian rights of Miller & Lux Incorporated, its successors, and affiliated companies.

Miller & Lux Incorporated owned, at the times involved, 46,800 acres of the 82,000 acres of riparian uncontrolled grasslands heretofore mentioned. Defendant contends that 3 acre-feet of water per acre can be put to beneficial use on such 46,800 acres, or a total of 140,000 acre-feet per year; that, by reason of the reservations in the deeds, Miller & Lux Incorporated, its subsidiaries and successors have a prior right to that quantity for that purpose, and that 140,400 acre-feet should be deducted as to plaintiff Erreca, No. 46244, and plaintiff Gerlach, when computing the surplus available for their riparian rights.

The 46,800 acres of riparian uncontrolled grasslands owned by Miller & Lux Incorporated is in a situation, in respect to the use of the water of the river, comparable with that of plaintiffs. Such land benefits only by flooding. It has not absorbed and cannot absorb 3-acre-feet per acre from a spring flood, and the larger part of the flood passes down the river and does not benefit any of such riparian land, except as the volume helps to maintain a high water level. Since waters for such riparian rights are available

only at the high period of the spring floods, there is no practicable means of giving to the riparian Miller & Lux uncontrolled grasslands the beneficial use of 3 acre-feet per acre, in the absence of controlled diversion. There is no evidence that in the 75 years since the first artificial diversion by the predecessors of San Joaquin & Kings River Canal & Irrigation Company, Incorporated, there has been any construction of works for the purpose
164 of diverting San Joaquin river flood water to or upon such uncontrolled grasslands under such riparian rights, and there is no evidence of a plan to construct such works. Because of the time required for grassland to utilize 3 acre-feet of water per acre, and because of the relatively short time during which there is a surplus of water above the requirements of appropriative and prescriptive rights, and because of the topographical situation of the lands, controlled diversion is not feasible. The plan of defendant, hereinafter described, will not divert or otherwise supply water to such riparian uncontrolled grasslands.

Whatever effect the reservations above referred to may have as an estoppel, there cannot be a use in fact of the surplus water by Miller & Lux Incorporated, its successors or subsidiaries, upon the 46,800 acres of riparian uncontrolled grasslands in such a manner as to cause a reduction in the surplus available to plaintiffs.

DEFENDANT'S PLAN FOR UTILIZATION OF THE WATER

32. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California.

Such plan contemplated, among other things, the construction of a dam across the San Joaquin River at Friant, forming a reservoir. It contemplated the construction of two canals, one with a capacity of 1,000 cubic feet per second, referred to later as the Madera Canal, reaching north from the reservoir to the counties of Madera and Merced, and another, with a capacity of 3,500 cubic feet per second, referred to later as the Friant-Kern Canal, reaching south from the reservoir to the counties of Fresno, Tulare, Kings, and Kern. Except for occasional spills to provide reserve storage capacity for the purpose of flood control, the reservoir and canals were planned with capacity to store and divert substantially all the water customarily flowing in

the San Joaquin River at Friant. The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant.

165 33. The plan was duly approved by the President of the United States on December 2, 1935, such plan being set forth in a letter dated November 26, 1935, from the Secretary of the Interior to the President, which reads in part:

General Description of Project

The Central Valley project embodies a plan for the conservation, regulation, distribution, and utilization of the water resources of the Sacramento and San Joaquin Rivers to provide urgently needed water supplies for existing agricultural, industrial, and municipal developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt-hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservior on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal, and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation

of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated
166 in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature has filed notices of appropriation on the principal streams, which are in good standing. Water supplies studies made by the Department of Public Works of California, U. S. War Department and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features

The principal engineering features of the project are as follows:

Kennett Dam Unit.—The Kennett Reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k. v. a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k. v. a. power plant will be constructed below the Kennett Dam. From the power plants a 200-mile power transmission line will extend to a main distributing substation near Antioch on Suisan Bay.

Contra Costa Conduit.—A canal, capacity 120 second-feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial, and agricultural water requirements.

San Joaquin Pumping System.—The works for this pumping system will comprise a dam and other works

in Sacramento delta to divert stored water from Kennett Reservoir through a channel into San Joaquin delta for salinity control, irrigation, and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on
167 San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota weir on San Joaquin River, elevation 160 feet. These works will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir.—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal.—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal.—The Madera Canal, maximum capacity 1,500 second-feet, will extend from Friant Reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project

Kennett Dam, Reservoir and power plants	$84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant Dam and Reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights, and general expense	8,000,000
Total	[1] 170,000,000

[1] So in the original.

* * * * *

Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

34. The plan has been altered in a number of respects since it was approved by the President. Among other things, the height of the Friant Dam has been increased from 250 feet to 320 feet, enlarging the storage capacity from 400,000 acre-feet to 520,000 acre-feet. The
168 proposed pumping system, which would have conveyed Sacramento River water up the bed of the San Joaquin River by means of natural and artificial channels and works in a series ending at the mouth of the Merced River, has been supplanted by another which will pump Sacramento River water from the delta into the proposed Delta-Mendota Canal, to be carried thence by gravity south to Mendota. The planned capacity of the Friant-Kern Canal has been increased from 3,500 to 4,000 cubic feet per second. Due primarily to the exigencies of the second World War, substantial portions of the project are not yet completed. Friant Dam still is without the drum gates for the spillways at the top and, until such gates are installed, the dam will impound approximately 100,000 acre-feet of water less than the planned storage. Friant-Kern Canal is under construction, but has not been completed.

35. Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills. Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control. Such spilling would not provide an adequate or dependable substitute for the spring floods in the irrigation of riparian uncontrolled grasslands.

The plan contemplated that defendant should acquire all existing rights to the use of the water flowing past Friant. Such rights were of three classes: (1) Use of the water for production of cultivated crops; (2) use of the water for irrigation of controlled grasslands; and (3) the riparian right to the flow of the river, subject to prior rights for the above purposes, for the irrigation of riparian uncontrolled grasslands, watering of livestock, and domestic purposes.

Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on crop lands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that suf-

169 ficient water would be released from the Friant Reservoir to meet the requirements of the crop land rights.

The plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished.

36. With some modification, defendant's original plan has continued as the plan of the defendant, and it has proceeded to carry it out by engaging in the construction of the dam at Friant and the Madera and the Friant-Kern canals, as well as certain other branches of the project.

To finance such work Congress has appropriated large sums of money by the following described acts:

June 22, 1936, c. 689, 49 Stat. 1597, 1622	$ 6,900,000
August 9, 1937, c. 570, 50 Stat. 564, 597	12,500,000
August 26, 1937, c. 832, 50 Stat. 844, 850	12,000,000
May 9, 1938, c. 187, 52 Stat. 291, 324	9,000,000
May 10, 193[illegible], c. 119, 53 Stat. 685, 719	10,000,000
April 6, 1940, c. 77, 54 Stat. 82, 87	5,000,000
June 18, 1940, c. 395, 54 Stat. 406, 438	23,600,000
June 28, 1941, c. 259, 55 Stat. 303, 336	34,750,000

The act of October 17, 1940, c. 895, 54 Stat. 1198, 1200, reauthorized the project, and the act of July 30, 1941, c. 334, 55 Stat. 612, in aid of the construction of the project, provided for acquisition of Indian lands embraced therein.

The Execution of Defendant's Plan

(a) *Purchase of the prior rights of Miller & Lux Incorporated and agreement for exchange of water*

37. Promptly after the approval of the plan, defendant proceeded to ascertain the extent of the controlled grassland and the riparian water rights and the compensation to be paid therefor, and for that purpose an appraisal board was appointed. Attorneys for the United States Reclamation Bureau instructed the board as to the extent of such water rights. The board appraised the controlled grassland rights and the riparian rights of Miller & Lux and its subsidiaries, and thereafter on July 27, 1939, the defendant and Miller & Lux Incorporated and its subsidiaries entered into a written contract whereby Miller &

170 Lux Incorporated and its subsidiaries agreed to relinquish or convey to defendant all their rights to the use of the water of the San Joaquin River, except and in excess of specified rates of flow deemed to be equivalent in quantity to their existing water supply under rights for the irrigation of crop lands. In consideration, the defendant agreed to pay to Miller & Lux Incorporated and its subsidiaries the sum of $2,450,000 for the water

rights so to be conveyed. The defendant arrived at this amount on the basis of the appraisals of its board, which fixed an average price of approximately $13 per acre for the appropriative and prescriptive controlled grassland rights and approximately $9 per acre for the riparian rights of uncontrolled grasslands.

38. Because of the fact that, prior to the execution of such contract, Miller & Lux Incorporated had conveyed or had agreed to convey certain of the land to other persons, which agreements and conveyances contained certain exceptions, conditions, or reservations in relation to the right to the use of water of the San Joaquin River, and because the question had been raised whether the land involved in such agreements and conveyances retained the riparian rights originally a part of them, the contract contained the following provision:

> (e) Of the sum of $2,450,000.00, payable to Vendors as provided by this Contract, the sum of $1,938,650.00 shall be paid unconditionally within sixty days after the delivery of the deed as provided by this Contract. The remainder of said sum, to wit, $511,350.00, shall within said period of sixty days be deposited with such escrow agent as may be selected by the Secretary of the Interior, to be then invested by said escrow agent, at current open market prices, in such Federal securities as may be agreed on between the Secretary of the Interior and the Vendors, and thereafter said securities shall be held in escrow on the terms and conditions herein provided.
>
> There is delivered herewith to each of the parties hereto, and as a part of this Contract, a duplicate original of a map marked Exhibit "B" and entitled "BUREAU OF RECLAMATION, UNITED STATES DEPARTMENT OF THE INTERIOR, CENTRAL VALLEY PROJECT—Map showing grasslands and riparian lands basic to contract between the United States, and Miller & Lux, Inc. and
> 171 Gravelly Ford Canal Company, dated July 27, 1939" and identified by the signatures of the respective parties hereto, upon which are delineated certain lands in this contract referred to as "Grass Lands" and as "Riparian Lands." The boundaries of said grass lands are outlined in green and the boundaries of the Riparian Lands are outlined in orange. Said map need not be recorded.
>
> In the event final judgments are entered by a court of competent jurisdiction in actions at law or suits in equity initiated prior to the sixth anniversary after the initial storage or diversion of said waters of the

San Joaquin River by the United States by means of Friant Dam, diversion works, or other works, wherein it is adjudged that the owners of the lands, or any of them, described in said Exhibit "B," are by reason of such storage or diversion deprived of water which they are lawfully entitled to use on said lands, and the United States makes compensation therefor, then the United States shall be paid out of said escrow in amount equal to the damage per acre for each acre of said land adjudicated by such judgment to be so deprived of water, but not to exceed $9.00 per acre for said riparian lands and $13.00 per acre for said grasslands.

In the event final judgments or decrees are entered by a court of competent jurisdiction, in suits initiated within the period last above described, wherein the United States or its officers, agents, or employees, by reason of a paramount right as against it to the use of any of said waters on said lands, or any of them, delineated on said Exhibit "B," are permanently enjoined from impounding or diverting any of said waters by said means, then the United States shall be paid out of said escrow an amount equal to $9.00 per acre for each acre of said riparian lands and $13.00 per acre for each acre of said grasslands, which by said judgments are decreed to be entitled to receive such water from the San Joaquin River.

All the lands described in the petitions of plaintiffs herein are delineated upon the map referred to in the contract as being within the boundaries outlined in orange, thus describing them as riparian lands.

39. The rates of flow specified in such contract as being reserved by Miller & Lux Incorporated were mean daily flows in cubic feet per second as follows:

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During the month of—	*Number of cubic feet per second, plus the Chowchilla Canal right*
January	400
February	535
March	1,310
April	1,950
May	2,285
June	2,450
July	2,475
August	2,210
September	1,335
October	660
November	485
December	400

The Chowchilla Canal right varies according to the flow, the maximum per year being estimated at 49,300 acre-feet (finding 21).

Computed on the basis of 2 acre-feet per day for one second-foot of flow and estimating the Chowchilla Canal right at 49,300 acre-feet, the yearly aggregate reserved by Miller & Lux Incorporated, and its subsidiaries, is 1,056,340 acre-feet.

40. On the same day that Miller & Lux Incorporated and its subsidiaries and the defendant made the agreement for the sale and purchase of the controlled grassland and riparian rights, they entered into a further agreement, referred to as the "contract for exchange of waters." This agreement provided in detail for the release of water from Friant Reservoir and for the delivery of substitute water through the Delta-Mendota Canal when that system would become operative.

On September 14, 1939, Miller & Lux Incorporated and Gravelly Ford Canal Company made, executed, and delivered to defendant a conveyance of the rights described in the agreement dated July 27, 1939.

(b) *Construction of works and impounding of water*

41. Friant Dam is a straight gravity concrete dam. Its total length at the top is 3,430 feet and the maximum height is 320 feet. Across the top of the dam is a roadway whose elevation above mean sea level is 583 feet.
173 Unless otherwise mentioned, all the elevations given in connection with the openings hereinafter mentioned are the elevations at the upstream face of the dam and relate to mean sea level.

The only openings extending entirely through the dam are those hereinafter mentioned. The first is the spillway at the top of the dam which is designed to be controlled by three drum gates. These drum gates when installed will be large steel cylinders, each 100 feet long and 18 feet in diameter, which will float up and down in a chamber at the bottom of the spillway opening and will be raised and lowered by the water let into and released from the chamber. By increasing the amount of water in a chamber the gate will float up, closing, to the extent desired, the opening which the particular gate is to control. By reversing the process the gate will go down. It can be adjusted and held to any point. When the gates are raised to the designed maximum elevation, the maximum water surface will be at elevation 578. When the gates are completely lowered, the maximum water surface will be at elevation 560, except for

the head required to flow the water over the spillway. The drum gates were intended to be installed in 1942, but due to the advent of war in 1941, progress in that connection was halted and the drum gates are not yet installed.

The next lower opening is the outlet to the Friant-Kern Canal at the south side of the dam. The center line of the outlet is at elevation 464.

The next lower opening is the outlet to the Madera Canal at the north side of the dam. The center line of the outlet is at elevation 446.

Next are four openings referred to as the permanent river outlets, all on the same level. The inverts, the lowest points in the cross sections of the openings, are at elevation 375.42.

The next were three temporary openings, used during construction to permit the water of the river to pass, but which were later filled with concrete. The floors of these openings were at elevation 316.

The normal low-water surface of the river prior to the construction of the dam was at elevation 305.6.

174 The following table sets out the elevations above sea level and corresponding elevations above the normal low-water surface of the river at the site of the dam.

	Elevation in feet above mean sea level	Height in feet above normal low-water surface of river
Roadway on top of dam	583	277.4
Water surface with drum gates raised	578	272.4
Water surface without drum gates	560	254.4
Center line of outlet to the Friant-Kern Canal	464	158.4
Center line of outlet to the Madera Canal	446	140.4
Invert of river outlets	375.42	69.82
Floor of temporary construction openings	316	10.4
Normal low-water surface of river	305.6	0

42. The contract for the construction of the dam was awarded on October 9, 1939, and construction was commenced on November 3, 1939. In the early stages of construction, and prior to March 6, 1941, the water of the river was carried over the foundation of the dam in a wooden flume. The floor of the flume was 4.4 feet above the normal low-water surface of the river. The amount of water impounded by reason of this difference in elevation is not disclosed. At one time while the flume was being used to pass the water, some high water exceeded the capacity of the flume, backed up behind the dam, and flooded the works. This flooding was not an intended consequence of the work, although a calculated risk.

43. The concrete work of the dam was divided into sections, referred to as blocks, numbered consecutively from one end of the dam to the other. As the concrete work progressed, three temporary openings, each 14 feet square, were left in the base of the dam through blocks 37, 39, and 41. The elevation of the floors of these openings at the upstream face was 10.4 feet above the normal low-water surface of the river. When use of the wooden flume was discontinued and the river was diverted through these temporary openings, there was a permanent impounding of water immediately behind the dam to a depth of not less than 10.4 feet. The number of acre-feet impounded is not shown, but was negligible.

During the late summer or early fall of 1941, the water was cut off from the temporary opening in block 41 and was carried through the temporary openings in blocks 37
175 and 39. Steel gates, in the nature of a headworks structure, then were firmly installed at the upstream end of the temporary outlet through block 41. Next, steel gates were similarly installed in the temporary outlet through block 39. After the gates were installed and in good operating condition, all the water was passed through the gate-controlled openings through blocks 39 and 41, and the outlet through block 37 was completely filled with concrete and permanently sealed off against further passage of water.

As the natural flow decreased with the season, the outlet through block 39 was cut off, all the water was passed through the gate-controlled temporary opening through block 41, and the opening through block 39 was filled with concrete and permanently sealed. That left only the temporary opening through block 41 open and in operation.

44. *Prior to October 20, 1941, the concrete work in the* dam had been completed to above elevation 400, but not as high as the elevation of the designed outlet into the Madera Canal. On or about that day, the gates in the temporary outlet through block 41 were partially closed for the purpose of impounding water and at the same time allowing the passage of approximately the amount of water required to be released under the agreement of July 27, 1939, with Miller & Lux Incorporated and its subsidiaries. This operation raised the surface of the water in the reservoir until, on November 11, 1941, the water reached elevation 375.42 and commenced to spill through the permanent river outlets.

The water was then cut off from the temporary outlet through block 41 and the work of permanently sealing that

outlet was begun. The sealing was completed in about five months. Except for the amount approximately equalling the quantities reserved by Miller & Lux Incorporated and its subsidiaries, no water passed the dam between October 20 and November 11, 1941.

When the water was cut off from the last temporary opening and the opening was sealed, the water below the inverts of the permanent river openings was permanently impounded, with no means left for its release. The amount so impounded was approximately 17,400 acre-feet.

45. The permanent river outlets were designed to be controlled by needle valves. Defendant had been taking
176 steps preliminary to the purchase of the valves when the international situation became so bad, and demands for materials for defense purposes became so great in the fall of 1941, that the valves could not be obtained. Except for the emergency and for the ensuing war, the valves to control the permanent river outlets would have been installed in the year 1942.

In the fall of 1941 the Madera Canal had been constructed to the extent of about 7 miles, but had not yet been completed. Construction of the Friant-Kern Canal had not been commenced.

For a short time in the winter of 1942, a high flow in the river caused more water to enter the reservoir than could be drained by the uncontrolled permanent river outlets and water was temporarily impounded to elevation 415. As the flow of the river dropped, the water impounded above the elevation of the permanent outlets drained through the uncontrolled permanent outlets into the river below the dam. At a time not disclosed by the evidence, temporary plugs were put into two of the permanent river outlets.

In 1943 valves for two of the permanent river outlets and for the Madera Canal outlet were borrowed from Boulder Dam and were installed. The first storage of water in the reservoir by means of closing or partially closing one of these valves was started on February 21, 1944.

46. The Madera Canal was completed in 1944. The surface level of the water in the reservoir was then raised sufficiently to divert a large quantity thereof through the Madera Canal, from which it was used to raise the general water table in the area served by the canal. Approximately 302,600 acre-feet of water was stored behind the dam at this stage of the operation. The flow of water through the dam was never completely stopped. For the six months after the needle valves were installed, the quantity of water released monthly was approximately that required under the agree-

ment of July 27, 1939, between the defendant and Miller & Lux Incorporated and its subsidiaries. During and after September 1944 the releases were substantially larger than the requirements of such contract, except during the months of November and December 1944, when they were substantially equal to such requirements.

177 In 1945 by means of control at the permanent river outlets, the reservoir was filled to the base of the openings for the drum gates, creating a storage of approximately 430,000 acre-feet of water. The drum gates are not yet installed and for that reason the reservoir has not yet filled to its designed capacity.

Other Sources of Supply

47. Defendant contends that there are and will continue to be certain sources of water available to plaintiffs, notwithstanding the construction of Friant Dam and the planned diversion of water through the Madera and Friant-Kern Canals.

Except in a year of extremely high water, the combined flows from the spills, from Fresno River, and from other streams would not flood the lands described in the petitions of plaintiffs herein.

There is no evidence of any material contributions of water to the San Joaquin River between Friant Dam and the lands described in the petitions of plaintiffs herein other than those described above.

The California Constitution

48. An amendment to the constitution of the State of California, Article XIV, Section 3, approved by the voters on November 6, 1928, reads:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much

178 of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses: *Provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

The operation of the government's plan by means of control through Friant Dam and the Madera and Friant-Kern Canals, will conserve water of the river and will increase the acreage of crop land under irrigation. Water previously used for controlled grassland will be available for crop land. The equivalent of approximately one acre-foot per acre per flood absorbed by the 82,000 acres of uncontrolled grassland will be available for crop lands and can be used, except for occasional spills, in seasons of low water supply. The portion of the flood waters which is not absorbed and which flows unchecked into Suisan Bay can be stored and used on crop lands.

There is some riparian use of the flood water downstream from the flood plain here involved, but the extent is not shown. The flood waters also help to repel the encroachment of salt water in the Delta area. There is no evidence from which the relative economic value of the control of the river under the government's plan can be approximately compared with that which would exist without such control. However, it is reasonable to infer from the evidence that the conservation and use of the water under the government's plan, while depriving riparian uncontrolled grasslands of flood waters heretofore customarily utilized by them, will be a more reasonable and beneficial use in the interest of the people and for the public welfare.

NAVIGABILITY

49. The San Joaquin River is a navigable stream. Apart from the plan set forth in findings 32-36, inclusive, no evi-
179 dence has been introduced proving or attempting to prove the effect of the completion and operation of Friant Dam and the diversion canals on the navigability of the San Joaquin River, except the evidence which shows that when the project comes into full operation, substantially all the flow of the river will be stopped at Temple Slough for 36 out of 48 years. During the other 12 years

the flow will be reduced to a small percentage of the flow which would have occurred in the absence of such dam and diversion works. No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channel as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods.

There is no dispute that the operation of the dam at Shasta will aid navigation of the Sacramento River.

CLAIM OF J. SHELDON POTTER, No. 46245

50. At all times herein mentioned on and after the 30th day of November 1935, the plaintiff, J. Sheldon Potter, has been and now is, subject to the "conditions, covenants, and reservations" hereinafter set forth, the owner in fee, in the possession and entitled to the possession of all those certain lots, pieces, and parcels of land, together with the appurtenances, situated in the County of Merced, State of California, described in his petition herein, and particularly bounded and described as follows:

A. All of the Swamp and Overflowed Land Surveys Nos. 297, 359, 307, 312, 311, 295, 296, 245, 294, 299, 313, 323, 324, 197, 196, 203, 202 201.

B. All of the South half of Swamp and Overflowed Land Survey No. 298.

C. All of Swamp and Overflowed Land Survey No. 150 lying East of the Easterly line of the East Side Canal & Irrigation Co.'s East Side Canal.

D. All that portion of Swamp and Overflowed Land Survey No. 361 described as follows:

Beginning at the northwest corner of the south half of the southwest quarter of Section 11, Township 9
180 South, Range 12 East, M. D. B. & M. (being portion of Swamp and Overflow Lot 361); thence due East 2639.05 feet to the northeast corner of said south half of the southwest quarter; thence north 0°33½′ West 559.04 feet to the center line of a slough; thence along the center line of said slough the following courses and distances: North 72°02½′ West 170.00 feet; North 0°09′ East 675.00 feet; North 41°15′ West 365.00 feet; North 27°08′ West 355.00 feet; North 61°03′ West 640.00 feet; North 18°49′ West 290.00 feet; North 34°01′ West 217.00 feet; thence leaving slough, South 89°58½′ West 1294.60 feet to the West line of said Section 11;

thence south along the west line of said Section and Swamp and Overflow Land Survey 361, 2,640.00 feet to the point of beginning. Containing 133.25 acres, more or less.

E. All that portion of Swamp and Overflowed Land Survey No. 346, described as follows:

Beginning at the northwest corner of Section 13, Township 9 South, Range 12 East, M. D. B. & M. (said Section 13 being Swamp and Overflow 346); thence South 5280.00 feet to the southwest corner of said Section 13; thence East 5278.65 feet to the southeast corner of said Section 13; thence North 285.00 feet to the center line of a slough; thence along the center line of said slough, the following courses and distances: North 55°53½′ West 305.00 feet; North 33°50′ West 175.00 feet; North 8°48′ West 235.00 feet; North 29°56′ West 225.00 feet; North 54°26½′ West 305.00 feet; North 26°05½′ West 205.00 feet; North 59°41½′ West 185.00 feet; North 6°39′ East 140.00 feet; North 35°30′ West 110.00 feet; North 20°13½′ East 125.00 feet; North 54°07½′ West 335.00 feet; North 18°20½′ West 250.00 feet; North 46°26½′ West 115.00 feet; North 13°38½′ West 430.00 feet; North 5°04½′ West 395.00 feet; North 62°14½′ West 180.00 feet; North 2°33′ East 280.00 feet; North 38°46½′ East 230.00 feet; North 26°20½′ East 205.00 feet; North 20°20′ West 180.00 feet; North 60°48½′ West 110.00 feet; North 87°38½′ West 160.00 feet; North 50°59′ West 175.00 feet; North 77°47½′ West 320.00 feet; South 11°20′ West 185.00 feet; North 81°41½′ West 295.00 feet; North 61°13½′ West 155.00 feet; North 84°58½′ West 185.00 feet; North 64°56½′ West 135.00 feet; North 2°46′ West 155.00 feet; North 38°07½′ West 315.00 feet; North 12°27′ West 120.00 feet; South 86°23½′ West 390.00 feet; South 70°25½′ West 335.00 feet; North 38°52½′ West 260.00 feet; North 27°21′ West 185.00 feet; North 53°51′ West 295.00 feet; North 5°55½′ East 60.70
181 feet to the North line of said section and Swamp and Overflowed Land Survey No. 346; thence West 845.50 feet to the point of beginning, containing 446.40 acres, more or less.

Reserving a thirty-foot road easement along the north line of Survey 346, and along the north line of Survey 296, for use as a public road.

All being in Township 9 South, Range 12 East, M. D. B. & M.

F. Location No. 3288, Swamp and Overflowed Lands in Sections 9 and 16, Township 9 South, Range 12 East, M. D. B. & M., described as follows:

Beginning at ¼ section corner between Sections 8 and 9, Township 9 South Range 12 East, M. D. M., thence East 11.50 chains; thence South 72.90 chains to San Joaquin River, thence down stream North 77° West 3.71 chains; thence South 71¼° West 8.33 chains; thence North 74.75 chains to point of beginning, containing 84.08 acres, more or less.

Subject to:

Right of way for all presently existing roads, highways, telephone, telegraph and electric power and pipe lines, sewers, drainage ditches, canals and other drainage, reclamation and irrigation works, and the easement to maintain, operate, and repair the same.

Said lands containing in the aggregate 6,038.14 acres.

51. J. Sheldon Potter acquired such land from Miller & Lux Incorporated, who by deed dated November 30, 1935, granted and conveyed such land to Potter, together with the tenements, heritaments, and appurtenances thereunto belonging or appertaining. The deed reads in part:

This conveyance is made subject to the following conditions, covenants, and reservations:

(1) To all existing water rights of the Grantor and its subsidiary companies, to wit: The San Joaquin & Kings River Canal & Irrigation Company, Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Columbia Canal Company, San Luis Canal Company, and Santa Rita Irrigation Company, and whether established by appropriation, prescription, or existing contract, and the right of the Southern California Edison Company, Ltd. and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor.

(2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it or them, by appropriation or prescription,
182 in or to the waters of the San Joaquin River or its tributaries (Grantor hereby declares that it will never assert as against Grantee, his heirs, successors, and assigns, that an appropriative or prescriptive water right is appurtenant to the land herein conveyed), and to store and or change the place of use of such water, whether within or without the watershed of said river, and such right of storage of such water, the right

to which has already been established by appropriation or prescription, and/or change of place of its use, may be exercised by any purchaser or assignee of said water rights.

(3) The covenants herein contained shall run with and be binding on the land herein conveyed, regardless of the ownership thereof.

It is further understood that the land herein conveyed is part of a larger tract of land belonging to the Grantor bordering on a natural stream and watercourse and this conveyance shall in no way affect the riparian rights of the remaindor of said tract of land retained and owned by the Grantor, but such riparian rights shall be preserved and be unaffected by this conveyance.

52. Prior to the execution and delivery of the deed mentioned in finding 51, Miller & Lux Incorporated presented to and requested Potter to accept a deed granting and conveying to him the lands above described, which proffered deed read in part:

Excepting and reserving the following property and property rights:

• • • • •

(d) It is expressly understood and agreed that Grantor reserves the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries; Grantor also reserves the right to take and divert at any point or points above the land herein conveyed all or any part of the waters of said River and its tributaries, whether naturally flowing therein or being therein after being stored, and thereafter use such waters for the irrigation of riparian or nonriparian lands within or without the water shed of said river and whether or not owned by Grantor, and for the production of hydroelectric power.

The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their or either of their agencies, any public district, mutual water company, firm, or
183 individual, to which Grantor may hereafter transfer or assign said reserved rights; *Provided, however,* that nothing herein contained shall be construed as limiting the rights of Grantee to make a reasonable use as a riparian owner and in common with lower riparian lands (including that of Grantor) of any waters which may at any time be actually flowing in or through any

slough or branch of said River located on the land herein conveyed.

* * * * *

The rights herein reserved shall constitute an easement in the land herein conveyed, and the covenants herein contained shall run with and be binding on said land.

Potter refused to accept such deed, and thereupon the deed referred to in finding 51 was made, executed, and delivered by Miller & Lux Incorporated to Potter.

53. The decision in *Miller & Lux Incorporated* v. *Madera Irrigation District, et al.*, No. 25729, found with respect to the Potter land:

That swamp and overflow survey No. 359 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 298 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 297 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 361 was riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow survey No. 346 was riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow survey No. 296 in the west half of Section 23 was riparian to Chamberlain Slough, to Mariposa Slough, and to the overflow channel of the river;

That the east half of Section 24 (swamp and overflow survey No. 299) was riparian to Mariposa Slough, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 295 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

184 That swamp and overflow survey No. 311 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 307 was riparian to the low channel of the river, to the high channel of the river, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 312 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 245 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 324 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 294 was riparian to Chamberlain Slough, to Mariposa Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 323 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 313 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 201 was riparian to the low channel of the river, to the high channel of the river, and to Chamberlain Slough;

That swamp and overflow survey No. 202 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 203 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 196 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough;

That swamp and overflow survey No. 197 was riparian to the low channel of the river, to the high channel of the river, and to Sand Slough, and

185 That swamp and overflow survey No. 150 was riparian to the low channel of the river, to the high channel of the river, to Sand Slough and Duck Slough, and to the overflow channel of the river.

54. The Madera Irrigation District contended in the actions described above that Miller & Lux Incorporated had constructed upon certain of its land involved therein, and particularly on the land now owned by J. Sheldon Potter, certain levees along the bank of the river and certain boxes or weirs at the heads of sloughs taking out of the river and traversing such land, and had thereby lost its riparian rights with respect to the flow of the river and such sloughs

and the overflow of such land. The Court adjudicated that all of such works were constructed and maintained for the purpose of regulating the flow of the water of the river and such sloughs by, through, and over such land, and for making the waters more useful and beneficial to such land, and that the construction and maintenance of such works did not affect the riparian rights of Miller & Lux Incorporated or the right of such land to the full flow of the stream.

55. Evidence other than the *Haines* decrees shows that the lands described in the petition of J. Sheldon Potter were and continued to be, as of October 20, 1941, riparian to the channels and sloughs as stated in the *Haines* decrees, except that it does not appear that swamp and overflow surveys Nos. 294 and 296 were riparian to Mariposa Slough, or that swamp and overflow surveys Nos. 197 and 202 were riparian to Sand (Chamberlain) Slough. Duck Slough, referred to in such decrees in connection with swamp and overflow survey No. 150, is not identified by any evidence. The lands in such surveys were, however, riparian to the other channels as stated in the decrees.

56. Each year up to and including 1941, with a few exceptions in years of extreme low water, substantially all such Potter lands were overflowed by the spring floods, and were thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-
186 Kern Canals will prevent the further overflowing of the Potter lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the Potter land at that time.

57. The difference between the fair market value of the above-described Potter lands on or about October 20, 1941, with riparian rights to the use of the water of the San Joaquin River, and the fair market value without such riparian rights was $54,343.26.

CLAIM OF MARTIN ERRECA, No. 46244

58. At all times herein mentioned on and after October 20, 1937, the plaintiff in case No. 46244, has been and now is, subject to the "exceptions" and "reservations" hereinafter set forth, the owner in fee, in the possession and entitled to the possession of that certain lot, piece, and parcel of land situated in the County of Merced, State of California, alleged in his petition herein, and described as follows:

Beginning at the Southwest corner of Swamp and Overflow Survey 300 in Township 9 South, Range 12 East, M. D. B. & M., thence North 89°25′ East 765.60 feet to the northeast corner of Swamp and Overflow Survey 136 in aforesaid Township and Range, thence along the east line of Swamp and Overflow Survey 136 South 2,701.60 feet, thence down and along the right bank of the San Joaquin River South 43°16′ West 115.60 feet, South 25°02′ West 322.00 feet, South 43°51′ West 246.00 feet, South 58°34′ West 370.00 feet, South 66°26′ West 479.35 feet, South 56°36′ West 150.00 feet, South 36°42′ West 645.00 feet, South 43°45′ West 405.00 feet, South 31°14′ West 180.00 feet, South 53°59′ West 55.00 feet, North 85°24′ West 90.00 feet, North 59°54′ West 200.00 feet and North 32°58′ West 219.50 feet, thence leaving river and running along the southerly right of way line of County Road North 41°56′
187 East 349.75 feet, thence along the arc of a curve to the right of radius 2,262.00 feet, a distance of 325.70 feet, thence North 50°11′ East 1,658.28 feet, thence leaving road North 1°07′ West 2,871.50 feet to the point of beginning, EXCEPTING therefrom a portion of a sixty-foot County Road, the center line of said portion of County Road being described as follows: Beginning at a point which bears South 1°07′ East 2,833.06 feet from the southwest corner of aforesaid Swamp and Overflow Survey 300, thence North 50°11′ East 924.72 feet to the east line of aforesaid Swamp and Overflow Survey 136, total acreage, exclusive of exception, 71.85 acres, more or less.

59. Plaintiff Erreca acquired such land from Miller & Lux Incorporated, who by deed dated October 20, 1937, granted and conveyed it to him. The deed read in part:

EXCEPTING and RESERVING the following property and property rights:

• • • • •

This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which the Grantor owns stock), whether such water rights be riparian, appropriative, or prescriptive, to the end that the Grantor, its successors, subsidiary, and affiliated companies, may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, its successors, subsidiary, and affiliated companies, against the Grantee, his heirs, and assigns, to the extent herein provided.

It is further understood that the land herein conveyed is part of a larger tract of land belonging to the Grantor bordering on a natural stream and watercourse and this conveyance shall in no way affect the riparian rights of the remainder of said tract of land retained and owned by the Grantor, but such riparian rights shall be preserved and be unaffected by this conveyance.

60. At the time of the execution and delivery of such deed, Miller & Lux Incorporated was the owner of large tracts of land riparian and nonriparian to the San
188 Joaquin River and its tributaries, which it had theretofore irrigated with the waters of the San Joaquin River either personally or through subsidiaries and affiliated companies, including mutual water companies in which it owned stock.

At the time of making such deed said Miller & Lux Incorporated owned certain lands riparian to the San Joaquin River situated above the lands of all the plaintiffs herein and also had made certain appropriations of water of the river on lands situated above the lands of such plaintiffs, but it owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere, except so far as it had theretofore permitted such storage for power purposes.

61. The decision in *Miller & Lux Incorporated* v. *Madera Irrigation District, et al.*, No. 25729, found with respect to the land involved in this claim that Swamp and Overflow Survey No. 136, of which the parcel here in-

volved is a part, was riparian to the low channel of the river and to Swan Slough.

Evidence other than the *Haines* decrees shows that the tract lies along and on the border of the main channel of the San Joaquin River and has continued to be riparian thereto. Swan Slough has not been identified in the evidence and may have been obliterated by the leveling operations mentioned below. There remains, however, part of an unidentified slough on the tract which conveys the pumped water hereinafter described.

Plaintiff Erreca took possession of the tract in 1934 under a contract to purchase and, prior to 1941, had leveled most of it for the purpose of growing hay, grain, and vegetables. The land, while not hilly or rolling, is uneven to the extent that leveling is necessary for the proper planting and growing of grain, alfalfa, vegetables, and similar crops.

62. Commencing a long time before 1941 this tract was protected by dikes so that, except in years of very high water, it was not subject to flooding other than that permitted under control.

At the times Sack Dam was not in place and the water in the river was in substantial flow, this tract benefited from subirrigation by seepage from the main channel. Plaintiff had installed a pump and, during such time as Sack
189 Dam was not in operation, could and did pump directly from the flow of the river to irrigate the crops on the tract.

When Sack Dam was in place there was substantially no surface flow, but plaintiff was able to pump some water from a pool in a deep hole in the river, where it collected by seepage. This did not provide a steady flow. The pumping would empty the pool and then have to be discontinued until the pool had filled again. Such seepage is not likely to be materially altered by the operation of Friant Dam and the canals, but such operations will completely stop pumping from the spring high waters, except in years of unusually high flow, and will deprive the tract of all benefit from subirrigation.

63. The difference between the fair market value of this tract on or about October 20, 1941, with riparian rights to the use of the water of the San Joaquin River and the fair market value without such riparian rights was $2,500.

CLAIM OF MARTIN ERRECA, ET AL., NO. 46247

64. By three agreements in writing dated, respectively, April 17, 1935, May 12, 1936, and November 1, 1936, Miller & Lux Incorporated, which was at that time the owner of

the land hereinafter described, agreed to sell to Martin Errecа, and he agreed to buy, for the considerations set forth in such agreements, all those certain lots, pieces, and parcels of land situated in the County of Merced, State of California, described as follows:

Parcel No. 1.—Beginning at the southwest corner of Section 30, Township 8 South, Range 12 East, M. D. B. & M., thence along the south line of Section 30, and along the north line of Swamp and Overflow Surveys 315 and 310, north 89°24½′ east 3,496.09 feet to a point on the westerly right of way line of the Eastside Canal, thence along the westerly right of way line of the Eastside Canal, south 16°37′ east 5,579.61 feet to a point on the north line of Swamp and Overflow Survey 316, Township 9 South, Range 12 East, M. D. B. & M., which bears south 89°46½′ west 1,890.31 feet from the northeast corner of Swamp and Overflow Survey 316, thence continuing along the westerly right of way line of the Eastside Canal, south 16°37′ east 67.34 feet, south 22°29½′ east 1,233.80 feet, south 25°59½′ east 863.51
190 feet, south 60°55′ east 522.34 feet, south 23°14′ east 157.88 feet and south 23°18′ west 298.00 feet, thence leaving the Eastside Canal, north 44°19½′ west 234.70 feet, north 67°57′ west 180.00 feet, and south 81°46′ west 269.00 feet, thence along the center line of a levee, south 89°41′ west 300.00 feet, south 85°05′ west 423.00 feet, south 82°21′ west 390.00 feet, south 63°39′ west 95.00 feet, south 31°46′ west 375.00 feet, south 64°21′ west 133.00 feet, south 79°12′ west 260.00 feet, north 84°10′ west 130.00 feet, north 58°15′ west 200.00 feet, north 77°47′ west 90.00 feet, south 83°46′ west 170.00 feet, south 77°50′ west 295.00 feet, south 65°33′ west 225.00 feet, south 39°37′ west 310.00 feet, south 52°50′ west 99.00 feet, south 68°10′ west 120.00 feet, and south 87°12′ west 562.10 feet, thence along the center line of a slough, south 13°38′ east 261.62 feet, south 46°38′ east 536.83 feet, south 33°45′ east 315.60 feet, south 52°01′ east 416.86 feet and south 8°37′ east 704.68 feet to a point on the north line of Swamp and Overflow Survey 300, thence along the north line of Swamp and Overflow Survey 300 (south line of Swamp and Overflow Survey 316) and along the south line of a sixty-foot road easement (hereinafter reserved), north 89°46½′ west 1,377.20 feet, to the northwest corner of Swamp and Overflow Survey 300, thence along the west line of Swamp and Overflow Survey 300 and along the east line of a sixty-foot road easement (hereinafter re-

served), south 0°38½′ east 921.90 feet, thence leaving west line of Swamp and Overflow Survey 300, and road easement, south 89°37½′ west 3,909.70 feet to a point on the east line of the D. L. McNamara property, thence along the east line of the D. L. McNamara property, north 0°22½′ west 3,577.70 feet to the northeast corner of the McNamara property, thence along the line common to Swamp and Overflow Surveys 321, 318, 184, and 322, said line being the north line of the D. L. McNamara property and along the south line of a sixty-foot road easement (hereinafter reserved), north 89°57′ west 4,764.15 feet to a point which bears south 89°57′ east 1,091.75 feet from the northwest corner of Swamp and Overflow Survey 321, thence leaving road easement and running along the east line of the H. B. & L. C. Wolfsen property due north 4,152.22 feet, thence leaving Wolfsen property south 73°35½′ east 1,455.75 feet, south 81° 39½′ east, 1,026.70 feet, south 35°44½′ east 1,177.30 feet to a point on the south line of Swamp and Overflow Survey 116, Township 8 South, Range 11 East, M. D. B. & M., thence along the south line of Swamp and Overflow Survey 116, south 89°17½′ east 1,064.40 feet
191 to a point on the center line of a levee, thence along center line of levee and along the center line of a sixty-foot-road easement (hereinafter reserved), north 1°27′ west 487.10 feet, north 1°44′ east 1,514.00 feet, north 31°45′ west 802.90 feet, north 28°00′ west 1,690.00 feet, north 17°14′ east 82.00 feet and north 49°52′ east 1,618.10 feet to a point on the south line of Section 25, Township 8 South, Range 11 East, M. D. B. & M., which bears north 89°44¼′ east 2,513.45 feet from the southwest corner of said Section 25, thence leaving levee and road easement and running along the south line of Section 25, north 89°44¼′ east 2,753.46 feet to the southeast corner of said Section 25 and the point of beginning. Containing 2,142.00 acres, more or less. A sixty-foot road easement (hereinafter reserved) described as follows: Beginning at a point which bears north 89°46½′ west 60.00 feet from the northwest corner of afore-mentioned Swamp and Overflow Survey 300, in Township 9 South, Range 12 East, M. D. B. & M., thence along the southwesterly line of said sixty-foot road easement, north 55°45′ west 4,674.40 feet to the northeast corner of the D. L. McNamara property in Township 9 South, Range 11 East M. D. B. & M., thence along the west line of said sixty-foot-road easement, north 0°24½′ west 689.00 feet, thence South 81°11½′

east 30.39 feet to the center line of said sixty-foot-road easement, thence along center line of said road easement north 10°01½′ east 4.20 feet, north 10° 15′ east 189.00 feet, north 59°45½′ west 175.00 feet, north 48°43½′ west 628.00 feet, north 23°16′ west 62.00 feet, north 3°21′ west 421.00 and north 1°27′ west 686.90 feet to a point on the center line of a levee, the continuation of said road along the levee being previously described. Reserving all of that portion of aforesaid sixty-foot road easements lying within above described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining land, together with the right to convey said road easements to the County for use as public roads.

Parcel No. 2.—A portion of Swamp and Overflow Survey 316, located in Township 9 South, Range 12 East, M. D. B & M., and being more particularly described as follows: Beginning at the northeast corner of said Swamp and Overflow Survey 316, as located with reference to United States Government Section corners in above described Parcel No. 1, thence along the north line of Swamp and Overflow Survey 316, south 89° 46½′ west 1,681.84 feet to a point on the easterly right of way line of the Eastside Canal; thence along the easterly right of way line of the Eastside Canal south 22°29½′ east 1,215.60 feet, south 25°59½′ east 794.49 feet, south 60°55′ east 527.66 feet, south 23°14′ east 312.12 feet, south 23°18′ west 720.57 feet, south 1°59′ east 785.14 feet, south 32°40′ east 579.38 feet, and south 69°23′ east 258.36 feet to a point on the east line of Swamp and Overflow Survey 316, which bears north 0°09½′ west 869.95 feet from the southeast corner of Swamp and Overflow Survey 316, thence along the east line of Swamp and Overflow Survey 316, north 0°09½′ west 4,412.35 feet to the point of beginning, containing 82.30 acres more or less.

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Parcel No. 3.—Beginning at a point on the line between Swamp and Overflow Survey 317 and Swamp and Overflow Survey 300, in Township 9 South, Range 12 East, M. D. B. & M., which bears south 0°38½′ east 921.90 feet from the northwest corner of Swamp and Overflow Survey 300 as located with reference to United States Government Section Corners in above described Parcel No. 1, thence along the west line of Swamp and Overflow Survey 300, and along the east line of a sixty-foot road easement (hereinafter re-

served) south 0°38½′ east 4,391.76 feet to the southwest corner of Swamp and Overflow Survey 300, leaving road easement, thence south 89°38′ west 1,870.40 feet along the north line of Swamp and Overflow Survey 136 to the corner common to Swamp and Overflow Surveys 320 and 136 in Township 9 South, Ranges 11 and 12 East, M. D. B. & M., thence south 89°49′ west 2,058.80 feet along the north line of Swamp and Overflow Survey 320 to a point, thence along the east line of the D. L. McNamara property, north 0°22½′ west 4,382.60 feet, thence north 89°37½′ east 3,909.70 feet to the point of beginning, containing 394.81 acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining lands, together with the right to convey said road easement to the County for use as a public road.

Parcel No. 4.—Beginning at the southwest corner of Swamp and Overflow Survey 300 in Township 9 South, Range 12 East, M. D. B. & M., which bears south 1°07′ east (south 1°07′ east equal to south 0°38½′ east in Parcel No. 1), 5,313.66 feet from the northwest corner of said Swamp and Overflow Survey 300 as located in above-described Parcel No. 1, thence south 1°07′ east along the east line of a sixty-foot road
193 easement (hereinafter reserved) 2,794.62 feet to a point on the northerly right of way line of a County road, thence along the northerly right of way line of County Road, south 50°11′ west 1,706.68 feet, thence along a curve to the left of radius 2,322.00 feet a distance of 334.34 feet, thence tangent to said curve, south 41°56′ west 333.89 feet, thence leaving County road and running down and along the right bank of the San Joaquin River, north 61°03′ west 160.00 feet, north 35°24′ west, 225.00 feet, north 22°19½′ west 190.00 feet, north 8°07′ west 115.00 feet, north 5°13′ east 150.00 feet, north 36°39′ east 255.00 feet, north 12°23½′ east 580.00 feet, and north 24°55′ west 96.37 feet, thence leaving right bank of the San Joaquin River and running along the line between Swamp and Overflow Survey 320 and Swamp and Overflow Survey 136, north 0°54′ west 2,779.30 feet to the northwest corner of Swamp and Overflow Survey 136, thence north 89°09½′ east 1,870.40 feet (north 89°09½′ east equal to north 89°38′ east for above-described Parcel No. 3), to the point of beginning, containing 157.78

acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining lands, together with the right to convey said road easement to the County for use as a public road.

Parcel No. 5.—Beginning at the southwest corner of Section 25, Township 8 South, Range 11 East, M. D. B. & M., thence along the line of common to Swamp and Overflow Surveys 63 and 314, due south 2,600.50 feet to the southeast corner of Swamp and Overflow Survey 63, thence along the line common to Swamp and Overflow Surveys 63 and 116, south 89°32½′ west 1,712.90 feet to the northeast corner of the H. B. & L. C. Wolfsen property, thence along the east line of Wolfsen property, due south 1,140.68 feet, thence south 73°35½′ east 1,455.75 feet, south 81°39½′ east 1,026.70 feet, south 35°44½′ east 1,177.30 feet to a point on the south line of Swamp and Overflow Survey 116, thence along the south line of Swamp and Overflow Survey 116, south 89°17½′ east 1,064.40 feet to a point on the center line of a levee, thence along the center line of the levee and along the center line of a sixty-foot road easement (hereinafter reserved) north 1°27′ west 487.10 feet, north 1°44′ east 1,514.00 feet, north 31°45′ west 802.90 feet, north 28°00′ west 1,690.00 feet, north 17°14′ east 82.00 feet and north 49°52′ east 1,618.10
194 feet to the south line of aforesaid Section 25, thence along the north line of Swamp and Overflow Survey 314 and the south line of Section 25, south 89°44¼′ west 2,531.45 feet to the point of beginning, containing 285.54 acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining lands, together with the right to convey said road easement to the County for use as a public road.

Parcel No. 6.—Beginning at the southeast corner of Section 26, Township 8 South, Range 11 East, M. D. B. & M., said point of beginning being the northeast corner of Swamp and Overflow Survey 63, thence along the north line of Swamp and Overflow Survey 63 and along the south line of Section 26, south 89°44¼′ west 5,284.91 feet to the southwest corner of aforesaid Section 26, thence continuing along the north line of Swamp and Overflow Survey 63 and the south line of

Section 27 of aforesaid Township and Range, south 89°44¼′ west 2,643.59 feet to the south quarter corner of aforesaid Section 27 and the northwest corner of Swamp and Overflow Survey 63, thence along the south line of Section 27 and the north line of Swamp and Overflow Survey 64½, south 89°44¼′ west 1,321.10 feet, thence south 0° 13¾′ west 2,635.39 feet to the north line of Swamp and Overflow Survey 205, thence along the line common to Swamp and Overflow Surveys 64½, 63, 205, 304, and 116, and along the north line of the H. B. and L. C. Wolfsen property, north 89° 32½′ east 7,547.07 feet to the northeast corner of the Wolfsen property, thence north 89° 32½′ east 1,712.90 feet to the southeast corner of Swamp and Overflow Survey 63, thence due north 2,600.50 feet to the point of beginning, containing 560.00 acres, more or less.

Parcel No. 7—Beginning at the southeast corner of Swamp and Overflow Survey 316, Township 9 South, Range 12 East, M. D. B. & M., as located with reference to United States Government corners in above-described Parcel No. 2, thence along the east line of Swamp and Overflow Survey 316, north 0°09½′ west 656.04 feet, thence along the westerly line of the East-side Canal, north 69°23′ west 400.42 feet, north 32°40′ west 700.62 feet, north 1°59′ west 864.86 feet north 23°18′ east 381.43 feet, thence leaving canal, north 44°19½′ west 234.70 feet north 67°57′ west 180.00 feet, south 81°46′ west 260.00 feet, thence along the center line of a levee, south 89°41′ west 300.00 feet, south
195 85°05′ west 423.0 feet, south 82°21′ west 390.0 feet, south 63°39′ west 95.0 feet, south 31°46′ west 375.0 feet, south 64° 21′ west 133.0 feet, south 79°12′ west 260.0 feet, north 84°10′ west 130.00 feet, north 58°15′ west 200.0 feet, north 77°47′ west 90.0 feet, south 83°46′ west 170.0 feet, south 77°50′ west 295.0 feet, south 65°33′ west 225.0 feet, south 39°37′ west 310.0 feet, south 52°50′ west 99.0 feet, south 68°10′ west 120.0 feet, south 87°12′ west 562.10 feet, thence along the center line of a slough, south 13°38′ east 261.62 feet, south 46°38′ east 536.83 feet, south 33°45′ east 315.60 feet, south 52°01′ east 416.86 feet, south 8°37′ east 704.68 feet, thence along the south line of Swamp and Overflow Survey 316 and the south line of a sixty-foot road easement (hereinafter reserved) south 89°46½′ east 3,851.96 feet, thence leaving road south 89°46½′ east 74.60 feet to the point of beginning, containing

224.46 acres, more or less. Reserving all of that portion of aforesaid sixty-foot road easement lying within above-described tract of land for use by the Grantor, its successors, assigns, and grantees, as means of ingress to and egress from its adjoining land, together with the right to convey said road easement to the County for use as a public road.

At all times since such dates, Martin Erreca and his successors have been in possession and are entitled to possession of such lands.

65. Thereafter and on the 7th day of June 1938, said plaintiff Martin Erreca, by mesne conveyances, assigned an undivided one-half interest in said contracts to one Thomas J. Gavin in consideration of the assumption by the assignee of one-half of the purchase price of said lands. Thereafter, said Thomas J. Gavin died and after due and regular proceedings in the matter of his estate, the Superior Court of the State of California, in and for the County of Santa Clara, duly gave and made its order appointing Bernard F. Gavin and George D. Coleman, administrators of his estate, and they duly qualified as such administrators and ever since have been and now are the duly appointed, qualified, and acting administrators of said estate.

66. On March 12, 1942, Bernard F. Gavin and George D. Coleman, as such administrators, made, executed and delivered to Martin Erreca, their deeds whereby they conveyed to him all the interest of the estate of Thomas J. Gavin in such contracts for the purchase of such lands.

196 67. On March 19, 1942, Miller & Lux Incorporated, made, executed, and delivered to Martin Erreca their deed whereby they conveyed to him the lands described in such agreements to sell.

68. On April 8, 1942, Martin Erreca and his wife made, executed, and delivered to John Erreca parcels 1 and 2 of such lands.

69. On August 26, 1943, Martin Erreca made, executed and delivered to John Erreca, an instrument in writing, whereby he assigned to John Erreca a 21/32nds interest in and to his claim, demand, and cause of action against the United States for compensation for the taking of water of the San Joaquin River by reason of the construction of Friant Dam, and further agreed to prosecute an action for the recovery of such compensation for his own use and benefit and for the use and benefit of John Erreca.

70. On August 31, 1943, Bernard F. Gavin and George D. Coleman, as administrators of the estate of Thomas J.

Gavin, made, executed, and delivered to Martin Erreca and John Erreca, an instrument in writing whereby they assigned to Martin Erreca 11/32nds and to John Erreca 21/32nds in their claim against the United States for the taking of water of the San Joaquin River, as against the land here involved, in connection with the construction of Friant Dam.

71. The agreements of sale, referred to in finding 64, dated April 17, 1935, and May 12, 1936, which covered parcels numbered 1, 2, and 7, as described in such finding, contained the following provision, referred to therein as an "exception" or "reservation":

> The land above described is riparian to Mariposa Slough, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller's) of any water which may at any time be actually flowing in said Slough as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries, whether naturally flowing therein or being therein after being stored or used by third persons at any point or points above the land herein agreed to be conveyed and use the same
> 197 for the irrigation of riparian or nonriparian lands and/or for production of hydroelectric power. The rights herein reserved may be transferred to and exercised by any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights. These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

The agreement of sale referred to in finding 64, dated November 1, 1936, which covered parcels numbered 3, 4, 5, and 6, as described in such finding, contained the following provision, referred to therein as an "exception" or "reservation":

> The land above described is riparian to Mariposa Slough and other sloughs, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller) of any water which may at any time be actually flowing in said Sloughs as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of

the San Joaquin River and its tributaries, whether naturally flowing therein or being therein, after being stored or used by third persons at any point or points above the land herein agreed to be conveyed, and use the same for the irrigation of riparian or nonriparian lands, whether within or without the watershed of said River, and/or for the production of hydroelectric power. The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their agencies, any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights. These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

The same provisions, except for designation of the parties, were repeated in the deed of March 19, 1942, referred to in finding 67.

72. At the time of entering into the agreements Miller & Lux, Incorporated, was the owner of large tracts of land riparian and nonriparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River. At such time Miller
198 & Lux, Incorporated, was subdividing its land for sale in small parcels and intended to provide for the future irrigation of such land with the rights which it then owned by means of public districts, private or mutual water companies, firms, or individuals to which it might assign said rights. At the time of entering into such agreements Miller & Lux, Incorporated, owned certain lands riparian to the San Joaquin River situated above the lands of all the plaintiffs herein, and also had made certain appropriations of water of the river on lands situated above the lands of such plaintiffs, but it owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere.

73. The decision in *Miller & Lux, Incorporated*, v. *Madera Irrigation District et al.*, No. 25729, found with respect to the land involved in the case of Martin Erreca, No. 46247:

That the land in Section No. 34, Township 8 S., Range 11 E. (swamp and overflow survey No. 64½ and part of swamp and overflow survey No. 63), was riparian to Mariposa Slough and the overflow channel of the river;

That the land in Sections Nos. 35 and 36, Township 8 S., Range 11 E. (Swamp and overflow surveys Nos. 116 and 314 and part of swamp and overflow Survey No. 63), was riparian to Mariposa Slough and the overflow channel of the river;

That the land in Sections Nos. 1 and 12, Township 9 S., Range 11 E. (in swamp and overflow survey No. 318), was riparian to Swan Slough and to the overflow channel of the river;

That the land in Sections 1 and 2, Township 9 S., Range 11 E. (in swamp and overflow survey No. 184) was riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow location 3318, and swamp and overflow surveys Nos. 319 and 316 were riparian to Mariposa Slough and to the overflow channel of the river;

That swamp and overflow survey No. 317 was riparian to the low channel of the river, to the high channel of the river, to Swan Slough, and to the overflow channel of the river;

That swamp and overflow survey No. 136 was riparian to the low channel of the river, to the high channel of the river, to Swan Slough, and to the overflow channel of the river.

199 Evidence other than the *Haines* decrees shows that the lands described in finding 64 were continued to be riparian to the channels and sloughs of the San Joaquin River, as stated in the *Haines* decrees.

74. The lands involved in this claim were originally grasslands subject to the uncontrolled overflow of the San Joaquin River. During the period in which it owned the lands, Miller & Lux Incorporated commenced a program of bringing the lands under cultivation by building levees or dikes where required along the river and the sloughs to confine and control the flow of the water therein, and by leveling the land.

When plaintiff Erreca came into possession of the lands, he leveled and brought under cultivation additional acreage thereof, so that in 1941 approximately 70 percent was leveled land on which crops were grown. The remainder was pasturage.

75. During the spring floods seasons, hereinabove described, the San Joaquin River water flows down the main channel past the Erreca land and through the sloughs across such land. Except in a year of extreme high flow, it is confined to the main channel and to the sloughs by means of levees or dikes and does not overflow the land. When the water is high in the main channel and in the sloughs, it seeps therefrom for a distance of approximately one-half mile. Plaintiff Erreca has promoted such seepage by the placing of checkdams in sloughs. During the years when there is no high water the crops are poor, but when there is high water the crops are good. Winter rains start the growth of pasturage, but the seepage is necessary to continue the

growth. About two-thirds of the land is adversely affected when there is no seepage. For these reasons the land derives benefit from the spring floods of the San Joaquin River.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further subirrigation of the Erreca lands during the spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river
200 was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to subirrigate the Erreca lands at that time.

76. The southernmost slough on the land involved in this claim, not identified in the evidence by name, carries San Joaquin River water through a siphon under the East Side Canal and thence across such land. However, the greater portion of the San Joaquin River water which crosses such land is taken from the river by Chamberlain Slough. At the eastern side of the lands involved in this claim the East Side Canal intersects Chamberlain Slough, and for about a mile, utilizes its channel (finding 8). Where the artificial channel of the canal resumes and Chamberlain Slough veers to the west, there is a structure known as Big Sand Spillway containing a gate which permits water to be diverted from the slough down the artificial channel of the canal or to be spilled into the continuation of the slough, or both, as existing conditions may require. About a half-mile farther down the canal a similar structure known as Little Sand Spillway provides an outlet for water into the continuation of Mariposa Slough which is also intersected by the canal. Mariposa Slough continues across the Erreca land as hereinabove described. Farther down the canal small streams flow into the canal from the east and, in times of low water when substantially no San Joaquin River water is flowing into the canal, the discharge from these streams reverses the flow in the canal and water from such east side stream tends to flow toward the river from the intersection with such streams.

Defendant contends that the water which spills into Chamberlain and Mariposa Sloughs from the canal and thereafter crosses the Erreca lands is water from the east side streams, either in whole or in part. Defendant

further contends that plaintiff Erreca has failed to sustain the burden of proving what portion of the water so spilled is San Joaquin River water whose flow is affected by Friant Dam, and what portion is east side stream water whose flow is not affected by Friant Dam.

201 Defendant further contends that the spill from the East Side Canal is permissive on the part of the owner of the East Side Canal and that plaintiff has no right to the continuation of such spills.

The evidence shows that during the periods of spring flood water, (a) the water which spills through the Big Sand Spillway and the Little Sand Spillway is from the San Joaquin River and is not from the east side streams; (b) the water flowing into the canal from the San Joaquin River exceeds the East Side Canal's appropriation and the capacity of the area served by the canal to utilize the water at that time; and (c) the volume of flood water is more than the canal can contain and convey to its service areas. Normally, reversal of the east side stream water in the reach under consideration does not take place until the flow of the San Joaquin River begins to drop at the end of the spring flood, at which time the owners of the canal throw a temporary earth dam across the canal which prevents the east side stream water from flowing back to the canal to the spillways above the lands of plaintiffs Erreca and Gerlach.

CLAIM OF GERLACH LIVE STOCK COMPANY, A CORPORATION
No. 46009

77. At all times here involved Gerlach Live Stock Company was and now is a corporation organized and existing under the laws of the State of California, with its principal place of business at Stockton, California.

78. On June 20, 1935, Miller & Lux Incorporated was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced, State of California, described as follows:

All of Section 16; north half, and north half of southeast quarter of Section 21; north half, north half of south half, and southeast quarter of southeast quarter of Section 22; east half of northeast quarter of Section 27; all in Township 8 South, Range 11 East, M. D. B. & M., containing 1,640 acres.

79. On June 20, 1935, Miller & Lux Incorporated made, executed, and delivered to Edward P. Waltz a deed by which it granted and conveyed such land to Waltz. The deed contained the following provision:

202 Excepting and reserving the following property and property rights:

d. This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the grantor, its successors, subsidiary, and affiliated companies (including mutual water companies in which the grantor owns stock), whether such water rights be riparian, appropriative, or prescriptive, to the end that the grantor, its successors, subsidiary, and affiliated companies, may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor, its successors, subsidiary, and affiliated companies, against the grantee, his heirs, and assigns to the extent herein provided.

e. It is furthe understood that the land herein conveyed is part of a larger tract of land belonging to the grantor bordering on a natural stream and watercourse and this conveyance shall in no way affect the riparian rights of the remainder of said tract of land retained and owned by the grantor, but such riparian rights shall be preserved and be unaffected by this conveyance.

80. On February 25, 1937, Waltz made, executed, and delivered to Gerlach Live Stock Company a deed by which he granted and conveyed such land to such company.

81. On May 9, 1942, Gerlach Live Stock Company made, executed, and delivered to C. A. Crane, a deed by which it granted and conveyed such land to Crane.

82. On May 12, 1942, Crane made, executed, and delivered his deed to Strathearn Bros., a copartnership consisting of R. P. Strathearn, J. L. Strathearn, Geo. P. Strathearn, and David L. Strathearn, whereby he granted and conveyed such land to such partners.

83. On March 18, 1943, Gerlach Live Stock Company assigned in writing to Strathearn Brothers all its right, title, and interest in and to all claims, causes of action, and demands against the United States for compensation for the taking of water, as against such lands, by reason of storage and diversion at Friant Dam.

203 84. With respect to the land involved in this claim, the decision in *Miller & Lux Incorporated* v. *Madera Irrigation District, et al.*, No. 25729, found that all such land was riparian to Mariposa Slough and to the overflow channel of the river.

Evidence other than the *Haines* decrees shows that the Gerlach lands, described in finding 78, were and continued to be as of October 20, 1941 riparian to the overflow channel of the San Joaquin River, and that all thereof, except the north half of the southeast quarter of section 21, were riparian to Mariposa Slough or its branch channels.

85. Such lands were valuable chiefly for the grazing of cattle. All, except approximately three-quarters of section 16, were good grasslands which were overflowed by the high water from the San Joaquin River during the spring flood season in all years except those of very low water and benefited therefrom. Such overflow prompted the growth of grass for the summer and fall cattle feeding.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of the Gerlach lands by the spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the Gerlach land at that time.

86. Defendant contends that the water which reaches such land comes through Mariposa Slough (also referred to as Deep Slough) and is composed of water from Owens Creek, which is not affected by the Friant Dam, as well as of water from the San Joaquin River. The Gerlach lands have no right to the use of the Owens Creek water.

In a state of nature Owens Creek emptied into Deep Slough upstream from the Gerlach lands and downstream from the line of the East Side Canal. Since the
204 construction of the canal, a structure known as Three *Bridges Spillway was built on the north side of the* canal where the canal intersects Owens Creek. A gate in the structure permits the release of water from the canal into the bed of the creek on the downstream side, or the confinement of water to the canal, or both, as existing conditions may require. Water from Owens Creek mingles with San Joaquin water in the canal, and it is probable that during the spring floods some of the mingled Owens Creek water is released through the spillway and becomes a part of the waters overflowing from Mariposa (or Deep) Slough onto the Gerlach lands. During the spring floods the volume

of San Joaquin River water reaching Mariposa Slough and its branches below the East Side Canal is large enough to overflow the Gerlach lands without the addition of the Owens Creek water. During the higher stages the San Joaquin River water also backs up a branch slough and floods such land from the southwestern corner of section 21. This flooding meets the flooding from Mariposa Slough and there is no evidence to indicate what area it would cover if there were no floods from the Mariposa Slough.

During the spring floods, the release of water at Three Bridges Spillway was not permissive on the part of the owner of the East Side Canal, but the release was made from necessity for the same reasons stated in finding 76 with reference to Little Sand and Big Sand Spillway.

87. On October 20, 1941, the difference between the fair market value of the Gerlach lands described in finding 78 with riparian rights to the use of the water of the San Joaquin River and the fair market value without such riparian rights was $10,440.00.

88. As of October 8, 1945, the certification date of the title report in evidence herein, the lands involved in this claim were subject to the lien of a deed of trust dated November 1, 1944, to secure payment of the sum of $36,000 to the Equitable Life Assurance Society of the United States, with provision for future advances. The evidence does not disclose whether any such advances were made or what, if any, payments have been made on such indebtedness.

205 THE DIVERSIONS THROUGH THE EAST SIDE CANAL

89. About 1887, the predecessors of the East Side Canal & Irrigation Company, a corporation, constructed the canal described in finding 8 and a diversion dam across the San Joaquin River immediately below the head thereof. It diverted San Joaquin River water by that means and filed a notice of appropriation therefor. Since that time water of the river has been diverted into the canal, either at the head, or from Chamberlain Slough, or from Mariposa Slough, or from all such sources. By virtue of such diversions and notice, the East Side Canal & Irrigation Company and Stevinson Water District assert the ownership of an appropriate right of 245⅞ cubic feet per second and have filed the case of *East Side Canal & Irrigation Company et al.*, No. 42666, in this Court, to recover compensation for the alleged taking of such right by the United States through the construction and operation of Friant Dam. Plaintiffs in these four cases concede the existence and

validity of such a right, but defendant contends that no such right was in existence on October 2[illegible], 1941, or for a long time prior thereto.

The canal and its head are downstream from the Potter lands and the alleged appropriate right does not affect the Potter riparian rights. The canal and its head are upstream from the lands involved in the *Gerlach* and the two *Erreca* cases, and the alleged appropriative right, if valid and existing, is prior to the riparian rights of those lands.

Because of the fact that such lands are benefited only by the spring flood overflow, which the East Side Canal cannot prevent from reaching and benefiting such lands (findings 75-76, 85-86), no findings are here made relative to the numerous detailed facts which are material to a determination of the existence and validity of the appropriate right claimed by the East Side Canal & Irrigation Company and Stevinson Water District.

The quantity of water which might be diverted under the full right claimed would alter the aggregate amounts stated in findings 22-31, but not enough to materially affect the spring flood in its relation to the overflow of the lands involved herein.

206 CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows: in favor of plaintiff J. Sheldon Potter, in the sum of $54,343.26; in favor of Martin Erreca, in the sum of $2,500.00; and in favor of Gerlach Live Stock Company, in the sum of $10,440.00. On each of the judgments compensation for delay in payment will be computed at four percent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff J. Sheldon Potter, in the sum of fifty-four thousand three hundred forty-three dollars and twenty-six cents ($54,343.26); in favor of Martin Erreca in the sum of two thousand five hundred dollars ($2,500.00); and in favor of Gerlach Live Stock Company in the sum of ten thousand four hundred forty dollars ($10,440.00). On each of the judgments compensation for delay in payment will be computed at four (4) percent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs in these suits seek to recover just compensation for the taking of the water rights which they claim they had as the owners of land riparian to the San Joaquin River or one of its sloughs. This has been done, if at all, by the construction of the Friant Dam on the San Joaquin River upstream from plaintiffs' lands. The purpose of the constructions of this dam is the diversion of the waters of the San Joaquin River from their present course into the Madera Canal and the Friant-Kern Canal. When the project is completed plaintiffs' lands will be wholly deprived of the water of the river which they now enjoy to a limited extent. It is for the deprivation of the use of this water that they sue.

207 1. Defendant defends, first, on the ground that the San Joaquin River is a navigable stream and that the erection of the Friant Dam was to improve navigation and for flood control, and hence, that it is not liable for the taking of property resulting from its erection.

Defendant says Congress has stated that the "entire Central Valley Project * * * is declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage, and for the delivery of the stored waters thereon, for the reclamation of arid and semiarid lands, and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertaking, and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes." Since one of the purposes was to improve navigation, defendant says it is immune from liability for the taking of plaintiffs' water rights as a result of carrying out the plan.

By this declaration Congress did say that a part of the purpose of the Central Valley Project was to improve navigation, although it also said that it had a number of other purposes in mind in the adoption of this plan. However, even though the improvement of nevigation was one of the purposes of the over-all plan, the erection of the Friant Dam, of which plaintiffs complain, was admittedly for the sole and only purpose of irrigating arid or semiarid lands, and perhaps also flood control. Instead of improving navigation on the San Joaquin River the erection of this dam destroyed any possibility of navigation on the upper reaches of the river.

The Central Valley of California is about 450 miles long. The northern two-fifths of it is known as the Sacramento Valley, and the southern three-fifth as the San Joaquin Valley. The northern part is drained by the Sacramento River and the southern part by the San Joaquin River. The project contemplated the construction of the Kennett Dam on the Sacramento River, a part of the purpose of which was the improvement of navigation on that river, but this was the only part of the entire project that could
208 be said to have been in aid of navigation. Certainly the erection of the Friant Dam had no relation to the improvement of navigation on either the San Joaquin or the Sacramento River, but had for its purpose the irrigation of certain lands nonriparian to that river. The effect of the erection of this dam was to make the San Joaquin River throughout its course less navigable than it had been before, and for many miles on the upper reaches of the river it converted it into a dry river bed.

When the case of plaintiff, Gerlach Live Stock Company, was before us on demurrer we said (102 C. Cls. 392):

> There is nothing in the Acts nor in the documents referred to that negative the allegation of plaintiff's petition that the purpose of the construction of this dam was solely to irrigate certain nonriparian lands. If this be true, and if the waters of this river have been diverted from plaintiff's lands, as alleged, there has been a taking under the Fifth Amendment.

The proof now shows without controversy that the purpose of the construction of this dam was to irrigate certain nonriparian lands, and not in aid of navigation. If this is so, defendant is not immune from liability for property taken in carrying out the project. Cf. *Kansas* v. *Colorado*, 206 U. S. 46, 85 *et seq.*; *Horstmann Co.* v. *United States*, 257 U. S. 138.

But defendant says that it was a part of defendant's purpose in the erection of this dam to control floods and that such flood control is within the power granted the Federal Government, for the exercise of which it is not liable in damages. It is true that the erection of the dam was for the purpose of conservation of the water and the prevention of its running down into the sea in times of floods or high waters. However, the purpose of this flood control was not to aid navigation or control commerce, but for the sole purpose of using the water to irrigate arid lands.

The Supreme Court did not hold in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, that the Federal Government is immune from liability for acts done to con-

trol floods where the only purpose of such control was the irrigation of arid lands.

209 We are of opinion that the defendant is liable for the taking of whatever rights plaintiffs may have had to the water of this river.

2. Plaintiffs claim the rights of riparian owners. The testimony shows that their lands were riparian to the San Joaquin River or some one or more of the sloughs thereof. Defendant's exhibit 13 and plaintiffs' exhibit 55 indicate that the lands of plaintiff Potter were riparian to the San Joaquin River, Chamberlain Slough and Mariposa Slough. They also indicate that the lands of Martin Erreca *et al.* were riparian to the Chamberlain and Mariposa Sloughs and to the San Joaquin River itself, and that the lands of Martin Erreca, sole, were riparian to the San Joaquin River, and that the lands of the Gerlach Live Stock Company were riparian to Deep Slough and certain other unnamed sloughs. Additional evidence in the record, including the testimony of witnesses to the actual overflow of the lands by the waters of the river and these sloughs, leaves no doubt in our minds that they were riparian to the rivers and sloughs except for a small portion of the lands of the Gerlach Live Stock Company. We have found this to be a fact.

Honorable Charles C. Haines, judge of the Supreme Court of the State of California, made findings of fact and conclusions of law on December 31, 1932, and on January 4, 1933, holding that plaintiffs' lands, among others, were riparian to the San Joaquin River or some one of its sloughs. These findings were in the cases of *Miller & Lux, Inc.*, v. *Madera Irrigation District; San Joaquin and Kings River Canal and Irrigation Co.* v. *Madera Irrigation District, Inc. and San Luis Canal Co.* v. *Madera Irrigation District, et al.* The decrees following these findings are known in the record as the "Haines decrees." Nothing has happened, so far as the record shows, since these decrees were entered that has materially changed the situation with respect to these lands.

While, of course, in the suits at bar the parties are not bound by these decrees, still they are highly persuasive.

Plaintiffs' riparian rights, however, were subject to prior appropriate and prescriptive rights of Miller & Lux, Inc., and its subsidiaries, The San Joaquin & Kings River Canal & Irrigation Company Incorporated, Gravelly Ford Canal Company, Firebaugh Canal Company, Colum-

210 bia Canal Company, San Luis Canal Company and Santa Rita Irrigation Company, and other upstream diverters. These companies had constructed certain canals

through which they had diverted and appropriated large quantities of the water of the San Joaquin River for the irrigation of lands, both riparian and nonriparian, owned by Miller & Lux, Inc., and other persons. In addition, Miller & Lux, Inc., had granted to the Southern California Edison Company and San Joaquin Light & Power Corporation the right to construct dams and reservoirs above the site of Friant Dam for the production of electric power. Plaintiffs' water rights were subject to these prior rights. The result was that plaintiffs' lands benefited only from the flood waters of the river.

However, notwithstanding these superior rights, there was left in times of high water sufficient additional water to overflow the lands of the plaintiffs or, by seepage, to raise the water level underneath their lands. The result was that by overflows and by seepage the lands of the plaintiffs were moistened and enriched and made more productive. The erection of the Friant Dam took these rights from plaintiffs. Plaintiffs' right to compensation is limited to their rights to have their lands moistened and enriched in these times of high water.

The defendant contends that the overflow of these lands did not in fact enrich them, but we think the evidence is to the contrary.

3. When the defendant decided upon the erection of the Friant Dam and the extinguishment of the riparian water rights of riparian owners downstream, it entered into contracts with Miller & Lux, Inc., and its subsidiaries, who diverted water for irrigation of the lands of others, and who also owned large acreages both riparian and nonriparian to the San Joaquin and its sloughs which were suitable for the raising of crops, and also certain grasslands which were watered by controlled irrigation, and grasslands which were not watered by controlled irrigation, but which were subject to overflow or seepage in times of high water. The contracts guaranteed to Miller & Lux the same amount of water they had previously enjoyed for the irrigation of their crop lands and controlled grasslands. The
211 rights of their uncontrolled grasslands to the excess water in times of high water were, however, to be appropriated by the defendant and paid for by it.

The parties agreed on a price of $9.00 an acre as the difference in the market value of the uncontrolled grasslands before and after the taking of these water rights. The total amount agreed to be paid for all such rights was $2,450,000. Miller & Lux, however, had sold to plaintiffs, and perhaps others, certain portions of their lands, and it was questioned whether a part of the sum to be paid might not properly

be payable to the grantees rather than to Miller & Lux, and so, it was agreed that $71,350.00 of the total sum should be placed in escrow, and should be used to reimburse the defendant for any judgments that might be recovered by the grantees of Miller & Lux, or their successors, for the deprivation of the riparian water rights appurtenant to these lands, limited, however, to $9.00 an acre for the uncontrolled grasslands. The balance was to be paid to Miller & Lux.

(a) The uncertainty as to whether or not Miller & Lux or the grantees were entitled to recover for deprivation of the water rights appurtenant to the lands conveyed was due to reservations contained in the deeds to these lands from Miller & Lux. These reservations differ in their terms. The reservation to plaintiff Potter reads in part as follows:

> The conveyance is made subject to the following conditions, covenants, and reservations:
>
> (1) To all existing water rights of the Grantor and its subsidiary companies * * * whether established by appropriation, prescription or existing contract, and the right of the Southern California Edison Company, Ltd., and the San Joaquin Light & Power Company to store the water of the San Joaquin River under existing contracts with the Grantor.
>
> (2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it to them, by appropriation or prescription, in or to the waters of the San Joaquin River or its tributaries * * * and to store and/or change the place of use of such water, whether within or without the watershed of said river, and such right of storage of such water, the right to which has already been established by appropriation or prescription, and/or
212 change of place of its use, may be exercised by any purchaser or assignee of said water rights.

Inasmuch as the deed to Potter was subject only to the "existing water rights" of Miller & Lux, and they did not have the right to store water at Friant Dam, it seems plain that plaintiff Potter, and not Miller & Lux, is entitled to recover from the defendant the value of the water rights appurtenant to the Potter lands, of which he was deprived by the erection of the Friant Dam.

This seems all the more clear since Miller & Lux at first offered to plaintiff Potter a deed, rejected by Potter, reading in part as follows:

> Excepting and reserving the following property and property rights:
>
> * * * * * *

(d) It is expressly understood and agreed that Grantor reserves the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries; Grantor also reserves the right to take and divert at any point or points above the land herein conveyed all or any part of the waters of said River and its tributaries, * * * and thereafter use such waters for the irrigation of riparian or non-riparian lands within or without the water shed of said river and whether or not owned by Grantor, and for the production of hydroelectric power.

The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their or either of their agencies. * * *

Under such a reservation Miller & Lux would probably have had the right to transfer to defendant the right to subordinate the Potter lands to such storage and diversion, but this proposal was rejected by plaintiff Potter and a deed reserving only existing water rights was agreed upon. Such existing water rights did not include the right to impound water at Friant Dam and to deprive lower riparian land owners of their rights to water during freshets and floods.

(b) The deed to a part of the Martin Erreca *et al,* lands contained a reservation reading in part as follows:

The land above described is riparian to Mariposa Slough, and purchaser shall have a right to make a
213 reasonable use as a riparian owner and in common with lower riparian land (including that of seller's) of any water which may at any time be actually flowing in said Slough as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert and use all or any part of the waters of the San Joaquin River and its tributaries * * * at any point or points above the land herein agreed to be conveyed and use the same for the irrigation of riparian or non-riparian lands, and/or for production of hydroelectric power. The rights herein reserved may be transferred to and exercised by any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights.

The reservation in the deeds to the remainder of the lands conveyed to these plaintiffs was to the same effect, except that the seller reserved the right to store, impound, and divert the waters of the San Joaquin River for the irriga-

tion of riparian or nonriparian lands, whether or not such lands were within the water shed of said river. The reservation also expressly provided that the rights might be conveyed to the United States of America, in addition to the other persons named in the reservation above quoted.

Plaintiffs Martin Erreca *et al.* insist that it was intended by these reservations to reserve only such rights as Miller & Lux had at the time the deeds were executed.

At the time the deeds were executed Miller & Lux had acquired the right to divert at points above the land conveyed and to use a part of the waters of the San Joaquin River and to use these waters for the irrigation of riparian and nonriparian lands, and they evidently intended to retain these rights notwithstanding the conveyance to plaintiffs Martin Erreca *et al.* But the reservation went further than this. It not only reserved the right to divert the water which they had already been diverting, but they further reserved the right to "store, impound, divert and use all or any part of the waters of the San Joaquin River * * *."

The concluding sentence of the reservation, not quoted above, reads:

> These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

214 It would seem, therefore, that Miller & Lux, Inc., intended to do something more than merely reserve their existing rights. Prior to the reservation Miller & Lux had the right to divert water from the stream, but it did not have the right to store and impound it.

Before the execution of this deed they had the right to divert something like 1,450,000 acre-feet of water out of a total of something like 1,811,000 acre-feet, which seems to have been close to the annual average flow of the river. They had not, however, acquired the right to divert the excess of something like 350,000 acre-feet; but in the deed they reserved, as against the grantee, the right to appropriate "all or any part" of the waters of the river, and it was provided that the rights so reserved should be an easement on the land conveyed and the riparian rights thereof; that is to say, the riparian rights in the lands conveyed should be exercised in subordination to the right of Miller & Lux to appropriate the balance of the water of the river, not only the water already appropriated, but, in addition, "all" the water of the river.

The condition of the deed reads, the grantor "reserves" the right. This word means to keep or retain; that is to say, to keep what one already has. You do not reserve a right

which you do not possess. However, when we take into consideration that the reservation went beyond the existing rights of Miller & Lux and that it provided that the rights reserved should be an easement on the lands conveyed and the riparian rights thereto, we think it must be concluded that the grantor had in mind not only retaining the rights it had already acquired, but also the right, as against the grantee, to appropriate additional water in the river—"all" the water.

(c) The reservations in the deed to Martin Erreca, sole, and to the Gerlach Live Stock Company are identical in their terms. They read in part:

> Excepting and reserving the following property and property rights:
>
> * * * * * *
>
> This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * whether such water rights be riparian, appropriative, or perscriptive, to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, * * * against the Grantee, his heirs and assigns, to the extent herein provided.

By this exception it was plainly intended to reserve to the grantor its existing water rights. Whether or not they intended to go further than this depends upon the proper construction to be given the clause reading: "including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns.

Prior to the execution of this deed Miller & Lux had granted to two hydroelectric companies the right to store water on the upper reaches of the San Joaquin River for the purpose of generating electricity. A part of the purpose of the reservation was no doubt to convey the lands subject to the right granted these companies. The language is also susceptible of the construction that the grantor intended also to reserve the right to enter into such contracts in the future. But we do not think it is necessary to determine whether or not the parties had in mind future contracts

as well. Whether or not the parties had in mind future contracts, nevertheless the extent of the reservation was "to contract for or permit *storage* on the upper reaches of the San Joaquin River." The right was not reserved to contract or to permit *diversion* of the waters of the river, as had been done in the reservation in the deed to the lands in Martin Erreca, *et al.*

What the United States has done that has caused the damage to plaintiffs' land is the *diversion* of the waters. It may be that under the reservation in the foregoing deed and under the contracts between defendant and Miller &
216 Lux defendant is protected from liability for the *storage* of the waters of the San Joaquin River, but there is nothing in the deed which permits it to completely *divert* the water from plaintiffs' lands. This is the thing that causes the decrease value of the lands.

The reservation expressly says that it "shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor * * *." In other words, grantee was estopped to complain of the fact that the grantor had entered into a contract to permit *storage* of the water; but he was not estopped to complain of the *diversion* of the waters from his lands. This right to the flow of the water he had as a riparian owner and the contract recites that riparian rights are not extinguished.

For the taking of this right by defendant we think plaintiffs Martin Erreca and Gerlach Live Stock Company, as well as plaintiff Potter, are entitled to recover; but we are of opinion that under the reservations in the deed in the case of Martin Erreca *et al.* plaintiffs are not entitled to recover.

Miller & Lux, Inc., has filed an intervening petition contesting the right of plaintiffs to recover, but it does not seek a judgment against the defendant and, hence, we do not consider whether or not it is entitled to judgment.

4. Defendant further says that plaintiffs have no right to recover because plaintiffs could not use the flood waters of the river without wasting them, and that such use was prohibited by the amendment to the California Constitution adopted in 1928. This amendment, being article XIV, section 3, reads as follows:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation

of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for
217 the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses: *Provided, however,* That nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Defendant says that this article of the California Constitution preserves in a riparian owner the right to use the waters of the stream to which his lands are riparian, but only to the extent that he can beneficially use them and without unnecessary waste of them. It says that plaintiffs cannot use the flood waters of the San Joaquin River without wasting them, and that since they are prohibited from wasting them, and they cannot use them without doing so, they have lost all their right to them.

Plaintiffs do not admit that their present use of these waters is wasteful; they say it is not wasteful to allow them to flow over their lands and then on to the lower riparian lands, before finally reaching the sea. They say that such a use of them benefits the lower riparian lands, and, in addition to this, they say the flood waters retard the encroachment of the salt water on the lands in the delta of the San Joaquin and Sacramento Rivers, and so benefits those lands. They further say that prior to the passage of the Constitutional Amendment they had a vested right for these waters to flow over their lands and that it was not intended to take these rights away from them. They say that one who would interfere with the customary use by a riparian owner must provide some physical solution to enable him to continue to receive his water and that he has no right to divert it and appropriate it without doing so.

218 It seems clear that the amendment to the California Constitution does not go as far as the defendant claims. The California cases hold that the mere fact that as the result of rainstorms and resulting floods, or of melting snows, or of natural flow otherwise, a large volume of water flows on to the sea, unused, wasted, and lost, does not permit a subsequent appropriator to disregard the rights of riparian owners, prior appropriators and overlying landowners to all of the waters of the stream which they can put to reasonably beneficial use under reasonable methods of use. If under these circumstances one seeks to appropriate the water wasted or not put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken. *Peabody* v. *City of Vallejo*, 2 Cal. (2d) 351, 40 P. (2d) 486; *City of Lodi v. East Bay Municipal Utility District*, 7 Cal. (2d) 316, 60 P. (2d) 439; *Hillside Water Co.* v. *City of Los Angeles*, 10 Cal. (2d) 677, 76 P. (2d) 681; *City of Los Angeles S. Aitken*, 10 Cal. App. (2d) 460, 52 P. (2d) 585; *Los Angeles Flood Control District* v. *Abbot*, 24 Cal. App. (2d) 728, 76 P. (2d) 188.

It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a physical solution as would permit them to continue to receive so much of the waters of San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the right to so much of the water they had formerly received as they could beneficially use.

The defendant by its acts has recognized that the owners of these lands were entitled to some use of the waters of this river. On July 27, 1939, it entered into a contract with Miller & Lux, the former owner of plaintiffs' lands, under which the defendant agreed to pay to Miller & Lux $9.00 an acre in compensation for the taking of the water

219 rights appurtenant to their uncontrolled grasslands which were riparian to the San Joaquin River and the sloughs thereof, including plaintiffs' lands. There was no determination as to what these water rights were, but it was recognized by this agreement that Miller & Lux did have some water rights on account of their ownership of these lands, and in order to com-

pensate them for the taking of these rights the defendant agreed to pay them $9.00 an acre, a portion of the amount to be placed in escrow to be paid to whatever person might be entitled thereto.

This was a recognition on the part of defendant that plaintiffs' rights were worth at least this much. It has actually placed the money in escrow for the rightful claimant and it certainly cannot complain at a judgment for that amount.

Plaintiffs, of course, are not limited to a recovery of this amount if they have been able to show that the value of their lands has declined a greater amount, but we do not think they have done so. On all the evidence we are convinced that this represents just compensation. Miller & Lux and defendant thought so, and we think they were right. We discuss this more fully hereinafter.

5. Be all this as it may, defendant says that at any rate it has not as yet taken any rights from plaintiffs. It says they are still receiving all the water they ever got and that although it may some day take substantially all the water, it has not as yet done so.

It is true that plaintiffs are still getting all the water they ever got because defendant's project has not yet advanced to the stage where their water has been cut off. It is also true that on October 20, 1941, all the water in the river was being lawfully diverted by owners of prior appropriative and prescriptive rights at points above plaintiffs' lands. It is also true that during the period from October 20 to November 11, 1941, the flow would not, even in the absence of any artificial interference, have been high enough to have flooded plaintiffs' lands.

Plaintiffs, however, say that it is immaterial whether on October 20, 1941, the flow, if not interrupted by the defendant, would have been sufficient to reach and water the
220 lands of plaintiffs after satisfying prior appropriative and prescriptive rights. They say that defendant had announced its intention to take all the water of the river, had entered upon and proceeded forward with works designed to accomplish that end, had actually wholly interrupted the flow, except for an amount sufficient to satisfy the prior appropriative and prescriptive rights, and had permanently impounded 17,000 acre-feet of water in the 23-day period commencing October 20, 1941, and that this fixes October 20, 1941, as the date of taking.

As the dam was being constructed defendant left three openings in it at 316 feet above sea level which is approximately the normal level of the river, through which the water was permitted to flow. One after the other these

openings were closed, the last one on October 20, 1941. When this last one was closed, all the water, except for enough to supply prior appropriative and prescriptive rights, was shut off from lower riparian owners until the pool behind the dam reached elevation 375 feet. At this elevation there were provided permanent openings in the dam through which the water could be released to control the elevation of the pool. These openings were supposed to have in them what is known as needle valves, which when closed retain the water in the pool, but which when opened permit the water to escape. Above this level, at elevation 446, it was intended to divert the water in the pool into the Madera Canal, and finally at elevation 464 feet there was an opening through which it was intended to divert the water into the Friant-Kern Canal.

On November 11, 1941, the water reached elevation 375, which was the permanent opening in the dam for the release of the waters in the pool; but the defendant had been unable to secure the needle valves for insertion in this opening to prevent the escape of waters in the pool; hence, after the water in the pool reached this height, it flowed down the bed of the river uncontrolled. The defendant did not secure these valves until sometime in 1944, and in the meantime, except for the brief period while the water was rising from elevation 316 to elevation 375, plaintiffs continued to receive as much water as they had ever received. Based on these facts defendant says it did not take plaintiffs' water
221 rights on October 20, 1941, the date on which the temporary openings were closed. This is the issue presented.

The Supreme Court has not as yet definitely settled the question as to the time when a taking occurs through the erection of a dam. In the most recent case to come before that tribunal, *United States* v. *Dickinson*, 331 U. S. 745, the court held that a landowner might wait until his land had been actually flooded before bringing his action and that the statute of limitations did not begin to run against him until that time, but it said:

> We are not called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens.

Plaintiff in *Kincaid* v. *United States*, 37 F. (2) 602, alleged that the United States had taken his lands by the adoption of the Mississippi River Flood Control Act of May 15, 1928, and by the advertising for bids for the construction of certain guide levees bounding the Boeuf Floodway. The Mississippi River Flood Control Act of 1928 had

adopted what was known as the Jadwin Plan for the control of floods on the Mississippi River. This plan, among other things, called for the Boeuf Floodway, through which in times of extreme high water the river would be allowed to flow. It also provided for the erection of guide levees on each side of this floodway in order to retain the waters therein. The lands of the plaintiff in that suit lay within this floodway and he sued to enjoin the defendant from carrying out the plan without first condemning and paying him for his lands.

The District Court held (37 F. (2d) 602) that although the physical occupancy of the land within this floodway did not occur until the land had been overflowed in time of flood, still "the process or subjecting it to that service and the taking possession, insofar as is either necessary or contemplated by the act, will begin with the construction of the first levee or works which are intended to direct the water upon the land." Since it held that these acts were threatened and that it thought the plaintiff was without an adequate remedy at law, it enjoined the defendant from
222 proceeding with the construction of the floodway. The Circuit Court of Appeals affirmed (49 F. (2d) 768).

The Supreme Court granted certiorari. In its opinion in 285 U. S. 95, reported *sub-nom. Hurley* v. *Kincaid*, on pages 103 and 104, it said:

> • • • We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's lands constitutes a taking of it—as soon as the Government begins to carry out the project authorized. Compare *United States* v. *Lynah*, 188 U. S. 445, 469; *United States* v. *Cress*, 243 U. S. 316, 328; *Peabody v. United States*, 231 U. S. 530, 538; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; 260 U. S. 327, 329.

But it held that since, in its opinion, the plaintiff had an adequate remedy at law for the taking, if one had occurred, he was not entitled to the injunction he sought and, hence, it dismissed plaintiff's bill.

In *Sponenbarger* v. *United States*, 308 U. S. 256, plaintiff asserted that the lands within this floodway had been taken merely by the adoption by Congress of the plan contemplating the erection of this floodway. The Court, however, pointed out that the Act of Congress adopting this plan prohibited the doing of anything to carry it out other than the building of levees, until further surveys had been made

and until it had been determined whether or not the additional measures provided for, including the Boeuf Floodway, were advisable. It also pointed out that after these surveys had been made the Boeuf Floodway had in fact been abandoned. Under these facts the court held that there had been no taking of plaintiff's property, reversing the opinion of the Circuit Court of Appeals holding that there had been a taking.

In the cases of *Peabody* v. *United States*, 231 U. S. 530, and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1; and 260 U. S. 327, there was not involved the question of when the taking had occurred, but whether or not there had been a taking at all; but, what was said in those cases sheds some light on the question of the time a taking actually occurs.

Plaintiffs, in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, alleged that the Govern-
223 ment had installed a battery and a fire control tower on lands to the rear of plaintiffs' lands, and that the guns from this battery could be fired only over plaintiffs' lands, and it was alleged that the defendant intended to do so at will. The court said:

> * * * If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose.

We think the reasoning behind this decision furnishes a guide for the determination of the time of the taking. That time, it would seem, comes whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent. So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred.

In the case at bar there can be no doubt that the defendant intended to deprive plaintiffs of whatever water rights they had in their lands. This is evidenced by a number of things. The construction of the dam, which would result in the deprivation of plaintiffs' rights, had been begun on No-

vember 3, 1939, a considerable time prior to October 20, 1941. In the 23 days following that date a considerable body of water had been impounded in the pool behind the dam, and construction was continuing insofar as materials could be obtained.

Not only that, but defendant had paid for many of the rights they intended to take. They had entered into an agreement with Miller & Lux to pay them something like two and a half million dollars for the taking of water rights, some of which were appurtenant to lands riparian to this river, including plaintiffs' lands. There can be no doubt on the record that defendant's intention to take plain-
224 tiffs' rights had been clearly demonstrated and that it was in the process of carrying out that intention.

We have no doubt that a taking had occurred not later than October 20, 1941. Certainly by that time defendant had brought about a decrease in the value of plaintiffs' lands. With the imminent prospect of their being deprived of any further rights to the flood waters of this river, they could not have sold them for their former value.

We hold that the taking of plaintiffs' water rights occurred not later than October 20, 1941.

6. There remains only the question as to the valuation to be put on these water rights, or, otherwise stated, the difference in the value of the lands with and without the rights.

The Commissioner has found that plaintiff Potter is entitled to recover a sum which represents compensation at the rate of $9.00 per acre. This seems to us correct. The Bureau of Reclamation in the United States Department of Interior appointed a board of [illegible]veyors to appraise the lands with and without these w[illegible]rs rights. They found that the difference in value was $[illegible].00 per acre. The State of California also appointed a similar board. It found a difference of $8.75 an acre. Miller & Lux, Inc., which owned tens of thousands of acres of land riparian to this river, agreed with the defendant on $9.00 an acre. Plaintiff Potter himself testified the difference in value was between $10.00 and $15.00 an acre.

A decline in the market value of the Potter lands of $9.00 an acre is well supported by the evidence.

The Commissioner has found that the value of Martin Erreca's land was decreased by the sum of $2,500.00. Defendant does not except to the amount found, if plaintiff had any rights at all and if the defendant took them. We think this amount represents just compensation.

We have found the difference in value of the lands of the Gerlach Live Stock Company to be $10,440.00. This is at

$9.00 per acre, except for a part of the acreage of this company which the evidence shows was not benefited by the waters of the river. The defendant excepts to this on the same grounds as stated above. For the reasons
225 stated, we do not think the exception is well taken. We are of opinion that compensation of $10,440.00 is just.

Judgments will be rendered against the defendant in favor of plaintiffs as follows: in favor of plaintiff J. Sheldon Potter, in the sum of $54,343.26; in favor of Martin Erreca in the sum of $2,500.00; and in favor of Gerlach Live Stock Company in the sum of $10,440.00. On each of the judgments compensation for delay in payment will be computed at four per cent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

The defendant on January 6, 1945, filed a motion to require the Southern California Edison Company, Ltd., and the San Joaquin Light and Power Corporation to appear and defend any interest they or either of them had in the litigation. Appearances by said companies were filed in due course. Since it appears that the interests of said companies are in no wise adverse to those of the plaintiffs or to those of the defendant, the action is dismissed as to them. It is so ordered.

HOWELL, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Justice,* concur.

227 *Judgment of the court—April 5, 1948*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows:

In favor of plaintiff J. Sheldon Potter, in the sum of $54,343.26; in favor of Martin Erreca, in the sum of $2,500.00; and in favor of Gerlach Live Stock Company, in the sum of $10,440.00. On each of the judgments compensation for delay in payment will be computed at four per cent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff J. Sheldon Potter, in the sum of fifty-four thousand three hundred forty-three dollars and twenty-six cents ($54,343.26); in favor of Martin Erreca in the sum of two thousand five hundred dollars ($2,500.00); and in favor of

Gerlach Live Stock Company in the sum of ten thousand four hundred forty dollars ($10,440.00). On each of the judgment compensation for delay in payment will be computed at four (4) per cent per annum from October 20, 1941, to date of payment. This will be added to the amount of the judgment in each case. The petition of Martin Erreca *et al.* is dismissed.

229 *Proceeding after entry of judgment—June 1, 1948*

ORDER

It is ORDERED this 1st day of June, 1948 that the word "admittedly" appearing in the seventh line of the third paragraph on page 67 of the findings of fact and opinion be stricken; otherwise the findings of fact, conclusion of law and opinion will stand.

BY THE COURT
(s) MARVIN JONES
Chief Justice.

On June 4, 1948, the defendant filed a motion for a new trial.

231 On June 28, 1948, the court entered the following order on said motion:

ORDER

IT IS ORDERED this 28th day of June, 1948, that motions for new trial be and the same are overruled, as follows:

46009 Gerlach Live Stock Company,
46245 J. Sheldon Potter,
46244 Martin Erreca, • • • defendant's motions.

• • • • • •

BY THE COURT
(s) MARVIN JONES
Chief Justice.

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233 Clerk's Certificate to foregoing transcript omitted in printing.

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236 IN THE
COURT OF CLAIMS OF THE UNITED STATES

No. 46265

JAMES J. STEVINSON (a corporation), PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46265—Filed Dec. 11, 1944

Now comes the plaintiff above named, and complaining of the defendant above named alleges and shows to the Court:

I.

That at all the times in this petition mentioned plaintiff was and is a corporation duly incorporated under the laws of the State of California and authorized to do business in the State of California.

237 II.

That at all the times in this petition mentioned plaintiff was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced and the County of Stanislaus, State of California, described as follows:

Parcel 1:

A portion of the Orestimba Rancho more particularly described as follows, to-wit:

Commencing at the corner to Sections 3, 4, 9 and 10, in Township 7 South, Range 9 East, Mount Diablo Base and Meridian, and running thence South 36½° West, 11½ chains; thence North 21¾° West, 41 chains to Oak tree on bank of slough; thence South 60¼° West, 1.75 chains for place of beginning; thence with the true meridian, magnetic variation 15° 30' East, North 25½° West 113.43 chains; thence North 38¼° East 51.42 chains to the left bank of the San Joaquin River; thence up said San Joaquin River with its meanderings South 58° East, 2.30 chains South 42¾° East, 1.70 chains, South 18¾° East, 1.70 chains, South 18¾° East, 5 chains; South 49° East, 5 chain; South 65° East, 6 chains; North 86½° East, 5.52 chains; North 72° East, 5 chains; North 69½° East, 9 chains; North 84° East, 9.50 chains; South 35° East, 10 chains; South ¾° East, 4.43 chains; South 11¾° West, 4 chains; South 20½° West, 3.96 chains; South 35¼° West, 7 chains; North 89½°

West, 4.50 chains; South 67¾° West, 3.40 chains; South 39½° West, 7.26 chains; South 37½° East, 7.78 chains; South 47¾° East, 11 chains; South 17¾° East, 10.40 chains; South 52° West, 9.60 chains; South 79° West, 238 2.62 chains; South 86° West, 11.70 chains; South 77¾° West, 3.76 chains; South 56° West, 3 chains; South 41° West, 3.80 chains; South 12° East, 5 chains; South 37° East, 22.10 chains; South 5½° East, 6.25 chains; South 1½° West, 1.86 chains; South 13½° West, 2.50 chains; South 20° West, 4.25 chains; South 3½° West, 1.34 chains; South 9° West, 1.27 chains; South 20¼° East, 1.32 chains; South 21¾° East, 14.16 chains; thence leaving said South bank of San Joaquin River South 60¼° West, 19.75 chains, to place of beginning. Being portions of Sections 27, 28, 33 and 34 in Township 6 South, Range 9 East, and a part of Section 4 in Township 7 South, Range 9 East, containing 583.35 acres, more or less, being a part of the Orestimba Rancho.

Parcel 2:

In Township 6 South, Range 9 East, Mount Diablo Base and Meridian, Northeast quarter of Southwest quarter of Southeast quarter, West half and Southeast quarter of Southwest quarter of Southeast quarter and Fractional Lot 3 in Section 16; Fractional Lots 1, 2, 3 and 4 and Swamp and Overflowed Land Surveys Nos. 157 and 112, in Section 21; Fractional Lot 2 and Northwest quarter of Northwest quarter and portions of Swamp and Overflowed Land Surveys 155 and 160 in Section 27; Swamp and Overflowed Land Surveys Nos. 113, 160 and 155, Fractional Lot 1 in Section 28; portion of Swamp and Overflowed Land Survey No. 114 in Section 33, Fractional Lots Nos. 1 and 4, Swamp and Overflowed Land Surveys Nos. 156, 114 and 115 and East half, in Section 34; Fractional Lots 1, 2 and 3, Northwest quarter of Southwest quarter, and Southwest quarter of Northwest quarter, and Swamp and Overflowed Land Survey No. 67 in Section 35; Swamp and Overflowed Land Survey No. 67 in Section 36.

239 *Parcel 3:*

In Township 7 South, Range 9 East, Mount Diablo Base and Meridian, Fractional Lots 1, 2, 3, 4, 5, 6 and 7, Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 67, 69 and 76 in Section 2; Fractional Lots 1, 2, 3, 4, 5, 6 and 7, West half of Northeast quarter, Swamp and Overflowed Land Surveys Nos. 85 and 67, in Section 3; Swamp and Overflowed Land Surveys Nos. 67, 330 and 236 in Section 10; Fractional Lots 1, 2, 3, 4 and 5, Northeast quarter of Northwest quarter, Northeast quarter,

Swamp and Overflowed Land Surveys Nos. 330, 236, 232 (re-survey of 188), 235 (re-survey of 189), 380 and 281 and 282 in Section 11; Swamp and Overflowed Land Survey No. 232 in Section 12; Swamp and Overflowed Land Surveys Nos. 233 and 234, 385, 278, Fractional Lots 1, 2, 3 and 4 in Section 13; Swamp and Overflowed Land Surveys Nos. 233 and 234 in Section 14; Swamp and Overflowed Land Survey No. 130 North of County Road and Fractional Lot 1 in Section 24.

Parcel 4:

In Township 7 South, Range 10 East, Mount Diablo Base and Meridian, South half of Fractional Lot 1, Fractional Lot 2, and Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 19; all of Fractional Lot 2 in South half, Fractional Lots 3 and 4, Northeast quarter of Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 128, 231 (re-survey of 131), in Section 20; Fractional Lots 1, 2, 3 and 4, and Swamp and Overflowed Land Surveys Nos. 124 and 127 in Section 28; Fractional Lot 1 and Swamp and Overflowed Land Surveys Nos. 128 and 231 (re-survey of 131), in Section 29, Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 30.

240 III.

That the San Joaquin River is a natural water course arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as Friant in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as Mendota, and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

IV.

That all of said lands lie along and border upon the channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of riparian owners with respect thereto, including the right to the use of the waters of said River for irrigation of said land, for the watering of live stock thereon, and for domestic purposes thereon.

V.

That on or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said River, situated to the north and south of Friant in the Counties of Madera,

Merced, Fresno, Tulare, Kings and Kern in the State of California, by the construction of a reservoir in the
241 main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the Counties of Madera and Merced, and the other leading south from said reservoir through the Counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said River which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VI.

That the said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant, and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said River and store the same in the said Friant Reservoir and prevented the same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day
242 the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VII.

That by said taking said land has been damaged in the sum of $75,000, and said sum, together with a sum equal to interest thereon from the date of taking to date of payment, at 7% per annum, constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

VIII.

That the plaintiff has endeavored to settle and adjust said claim herein with the defendant, acting through the United States Bureau of Reclamation, but has been unable

to do so for the reason that plaintiff and defendant have been unable to agree upon the amount of said compensation.

IX.

That there has been no assignment or transfer of the claim sued on herein, or any part thereof.

X.

That there has been no action on the said claim by Congress or by any department of the Government, except that Congress has appropriated money applicable to the payment of said claim and the Bureau of Reclamation promised to pay just compensation for the property taken, and has considered said claim but has been unable to agree with claimant on the amount of such compensation.

243

XI.

That plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

XII.

That plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and plaintiff believes the facts as stated in this petition to be true.

XIII.

The following Acts of Congress and Acts of the Executive Department are relied upon by the plaintiff:

1. House Document No. 35, Seventy-third Congress, being a report on the plan by the Army Engineers and containing recommendations as to Federal participation and being a report to the House Committee on Rivers and Harbors.

2. The record of the hearing had before the House Committee on Rivers and Harbors in 1935 when this report was laid before the committee together with various acts then before Congress as to the extent and form of Federal participation.

244

3. Joint Resolution of Congress dated April 8, 1935 (49 U.S.S.A.L. p. 115), making appropriation for relief purposes and appropriating certain money for relief to be expended under the direction of the President, under which the President allocated $15,000,000.00 to the project.

4. The Act of Congress approved August 30, 1935 (49 U.S.S.A.L. pp. 1028-1038); entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes"; and

authorized certain works under the direction of Secretary of War on the San Joaquin River.

5. Executive document by Harold L. Ickes, Secretary of the Interior, dated November 26, 1935, and approved by the President December 2, 1935, approving the project.

6. Act of Congress dated June 22, 1936 (49 U.S.S.A.L. p. 1597), entitled "An Act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1936, and prior fiscal years to supply supplemental appropriations for the fiscal years ending June 30, 1936, and June 30, 1937, and for other purposes", which Act at page 1622 under the caption "Bureau of Reclamation" "Central Valley Project" appropriated $6,900,000.00 for the continuance of the project.

7. The Act of Congress dated August 9, 1937 (50 U.S.S. A.L. pp. 564-597), entitled "An Act making appropriation for the Department of Interior for the fiscal year
245 ending June 30, 1938, and for other purposes", by which act $12,500,000.00 was appropriated for the Central Valley Project, together with the unexpended balance of the appropriation for the project contained in the First Deficiency Act, 1936.

8. The Act of Congress of August 26, 1937 (50 U.S.S. A. L. pp. 844-850), entitled "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes", which act appropriated $12,000,000.00 to the Central Valley Project.

9. The Act of Congress of May 9, 1938 (52 U. S. S. A. L. p. 291), which Act appropriated $9,000,000.00 to the Central Valley Project.

10. The Act of Congress of May 10 1939 (53 U.S.S.A.L. pp. 685-719), which Act, at page 719, appropriated $10,000,000.00 to the Central Valley Project, together with the unexpended balances of appropriations theretofore made.

11. The Act of Congress of April 6, 1940 (54 U.S.S.A.L. p. 87), appropriating $5,000,000.00 for the Central Valley Project.

12. The Act of Congress of June 18, 1940 (54 U.S.S.A.L. pp. 406-438), appropriating $23,000,000.00 for the Central Valley Project.

13. The Act of Congress of October 17, 1940 (55 U.S.S. A.L. p. 1200), reauthorizing the Project.

14. The Act of Congress of June 28, 1941 (55 U.S.S.A.L. p. 336), appropriating $34,700,000.00 for the Central Valley Project.

246 15. The Act of Congress of July 30, 1941 (55 U.S. S.A.L. p. 612), in aid of the construction of the Cen-

tral Valley Project and granting to the United States title of Indians in land embraced in the Project.

16. The Act of Congress of December 17, 1941 (55 U.S. S.A.L. p. 827), appropriating $3,000,000.00 for the Project.

17. The Act of Congress of July 8, 1942, authorizing the use of certain lands for the Project.

WHEREFORE, plaintiff prays that plaintiff recover judgment against said defendant for the sum of $75,000, together with a sum equal to interest at 7% per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, Stevinson, California,
December 5, 1944.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

247 *Duly sworn to by Edward F. Treadwell.*
Jurat omitted in printing. (All in italics.)

248 *General Traverse in Case No. 46266—Filed January 20, 1945.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) FRANCIS M. SHEA,
Assistant Attorney General.

J. B. M.
E. E. E.

249 IN THE
COURT OF CLAIMS OF THE UNITED STATES

No. 46331.

ARCHIBALD J. STEVISON, PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46331—Filed March 12, 1945.

Now comes the plaintiff above named and complaining of the defendant above named alleges and shows to the Court:

I.

That at all of the times in this petition mentioned plaintiff was the owner in fee, in the possession and entitled to the possession of all those certain parcels of land situate in the County of Merced, State of California, described as follows:

Fractional Lots 1, 2, 3 and 4, and Swamp and Overflow Surveys Nos. 132 and 133, in Section 27,
250 Township 7 South, Range 10 East, M. D. B. & M., containing 432.67 acres.

II.

That the San Joaquin River is a natural water course arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as Friant in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as Mendota, and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

III.

That all of said lands lie along and border upon the channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of riparian owners with respect thereto, including the right to the use of the waters of said River for irrigation of said land, for the watering of livestock thereon, and for domestic purposes thereon.

IV.

That on or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land and non-riparian to said River,
251 situated to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California; by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the counties of Madera and Merced, and the other leading south from said reservoir through the counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the

water of said river which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

V.

That the said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant, and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said works and completed the same to such an extent that it was able to and did first take water of said river and store the same in the said Friant Reservoir and prevented the
252 same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VI.

That by said taking said land has been damaged in the sum of $9,000.00, and said sum, together with a sum equal to interest thereon from the date of taking to date of payment at 7% per annum, constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

VII.

That the plaintiff has endeavored to settle and adjust said claim herein with the defendant, acting through the United States Bureau of Reclamation, but has been unable to do so for the reason that plaintiff and defendant have been unable to agree upon the amount of said compensation.

VIII.

That plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

253 IX.

That plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any

way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and plaintiff believes the facts as stated in this complaint to be true. The said plaintiff resides at Stevinson, Merced County, California.

WHEREFORE, plaintiff prays that plaintiff recover judgment against the defendant for the sum of $9,000.00, together with a sum equal to interest at 7% per annum from the 20th day of October, 1941 until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, San Francisco, California,
March 7, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

254 *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing. (All in italics.)*

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255 IN THE
COURT OF CLAIMS OF THE UNITED STATES

No. 46332

3-H SECURITIES COMPANY, PLAINTIFF,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

Petition in No. 46332—Filed Mar. 12, 1945

Now comes the plaintiff above named, and complaining of the defendant above named, alleges and shows to the Court:

I.

That at all of the times mentioned in this petition plaintiff 3-H Securities Company was a corporation organized and existing under the laws of the State of California and authorized to do business in the State of California.

II.

That at all of the times in this petition mentioned plaintiff was the owner in fee, in the possession and
256 entitled to the possession of all that certain parcel of land situate in the County of Merced, State of California, described as follows:

That portion of Swamp and Overflow Land Survey No. 130 in Section 24, Township 7 South, Range 9 East,

M. D. B. & M., situate south of County Road, containing 26 acres.

III.

That the San Joaquin River is a natural water course arising in the Sierra Nevada Mountains and flowing thence in a westerly direction and entering the San Joaquin Valley at a point known as Friant in the State of California, and then continuing in a westerly direction to its confluence with Kings River Slough at a point known as Mendota, and then turning and flowing in a northwesterly direction to the Bay of San Francisco.

IV.

That all of said lands lie along and border upon the channels of the said San Joaquin River and are riparian thereto, and the said plaintiff, as the owner of said lands, was and is, but for the taking by defendant hereinafter alleged, entitled to all the rights of riparian owners with respect thereto, including the right to the use of the waters of said River for irrigation of said land, for the watering of livestock thereon, and for domestic purposes thereon.

V.

That on or prior to the 2nd day of December, 1935, the defendant, through the Bureau of Reclamation,
257 Department of the Interior of the United States of America, formulated a project for the irrigation of a large area of privately owned land non-riparian to said River, situated to the north and south of Friant in the Counties of Madera, Merced, Fresno, Tulare, Kings and Kern in the State of California, by the construction of a reservoir in the main channel of the San Joaquin River at Friant, and the construction of two canals, one leading north from said reservoir into the Counties of Madera and Merced, and the other leading south from said reservoir through the Counties of Fresno, Tulare, Kings and Kern. Said plan contemplated the acquisition or condemnation and the storage, diversion and use by the United States of America through the said Bureau of Reclamation of all the water of the San Joaquin River, and particularly all of the water of said River which customarily flowed by, through, over and upon the lands of the plaintiff, and was part and parcel thereof, and said plan contemplated the taking and acquisition by the United States of America through the Bureau of Reclamation of all of the rights of the plaintiff in and to the waters of the San Joaquin River and the purchase or condemnation thereof by the defendant.

VI.

That the said plan was duly approved by the President of the United States on the 2nd day of December, 1935, and ever since has been and continued to be a plan of defendant, and the said defendant has proceeded to carry the same out by construction of said Friant Reservoir and the said canals, and the said defendant proceeded with said
258 works and completed the same to such an extent that it was able to and did first take water of said River and store the same in the said Friant Reservoir and prevented the same from flowing by, through, over and upon the lands of plaintiff on the 20th day of October, 1941, and on that day the said defendant took all of the rights of the plaintiff in and to the waters of the San Joaquin River as hereinabove set forth, and did then and there promise and agree to pay plaintiff reasonable compensation therefor.

VII.

That by said taking said land has been damaged in the sum of $780.00, and said sum, together with a sum equal to interest thereon, from the date of taking to date of payment, at 7% per annum, constitutes the reasonable value of the rights of plaintiff so taken and the reasonable compensation which defendant promised to pay and which plaintiff is entitled to receive for the taking aforesaid.

VIII.

That the plaintiff has endeavored to settle and adjust said claim herein with the defendant, acting through the United States Bureau of Reclamation, but has been unable to do so for the reason that plaintiff and defendant have been unable to agree upon the amount of said compensation.

IX.

That plaintiff is justly entitled to recover the amount claimed herein after allowing all just credits and offsets.

259 X.

That plaintiff herein has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and plaintiff believes the facts as stated in this petition to be true. That plaintiff's residence and principal place of business is in the County of Merced, State of California.

WHEREFORE, plaintiff prays that plaintiff recover judgment against the defendant for the sum of $780.00, together

with a sum equal to interest at 7% per annum from the 20th day of October, 1941, until paid, so agreed to be paid by defendant as compensation for said taking, and costs of suit.

Dated, San Francisco, California,
March 7, 1945.

TREADWELL & LAUGHLIN,
Attorneys for Plaintiff.

260 *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing. (All in italics.)*

261 *General Traverse in case No. 46331—Filed April 21, 1945*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) J. EDWARD WILLIAMS,
Acting Assistant Attorney General.

General Traverse in case No. 46332—Filed April 21, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) J. EDWARD WILLIAMS,
Acting Assistant Attorney General.

263 *Argument and submission of cases*

On January 7, 1948, the cases were argued and submitted on merits together by Mr. Edward F. Treadwell for plaintiffs, and by Mr. Ralph S. Boyd for defendant.

265 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J.—Filed March 1, 1948.*

Mr. Edward F. Treadwell for the plaintiffs. *Messrs. Treadwell & Laughlin* were on the briefs.

Mr. Ralph S. Boyd, with whom was *Mr. Assistant Attorney General A. Devitt Vanech*, for the defendant.

These cases having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. At all times here involved, plaintiff James J. Stevinson was and now is a corporation organized and existing under the laws of and authorized to do business in the State

of California. For convenience, his corporation sometimes will be referred to in these ...dings as the "Stevinson Corporation."

266 2. At all times here involved, plaintiff 3-H Securities Company was and now is a corporation organized and existing under the laws of and authorized to do business in the State of California.

As respects the lands described in their petitions herein, plaintiffs 3-H Securities and Archibald J. Stevinson are the successors in interest of plaintiff Stevinson Corporation.

3. The Central Valley of California, approximately 450 miles in length, lies between the Sierra Nevada Mountains on the east and the fringe of indistinct mountain chains along the ocean on the west. The northerly two-fifths of the valley, known as the Sacramento Valley, is drained by the Sacramento River system, and the southerly three-fifths, known as the San Joaquin Valley, is drained by the San Joaquin River system. The Sacramento River flows south and the San Joaquin flows northwest. Both empty through the same large delta into Suisan Bay, an arm of San Francisco Bay. The controversies in these cases center around the right to the use of waters of the San Joaquin River.

THE SAN JOAQUIN RIVER AND ITS FLOOD PLAIN

4. The San Joaquin River is a natural watercourse, with well-defined channels and banks and with its source in the Sierra Nevada Mountains. It flows thence westerly to the plains of the San Joaquin Valley, which it enters at a point known as "Friant," the site of defendant's storage and diversion dam, whose effect upon the waters of the river is the basis of plaintiffs' claims in these actions. From this point, the river continues westward approximately 40 miles to a point in the valley near the town of Mendota, where it is joined by the Fresno Slough of Kings River. It then turns abruptly toward the north and flows in a northwesterly direction until it reaches San Francisco Bay. Certain tributaries empty into the San Joaquin between Friant and the lands of the respective plaintiffs and contribute water in varying amounts to the river's flow.

5. In its course through the mountains and foothills and for some distance after it reaches the valley floor, the banks of the San Joaquin are so high as to preclude
267 overflow, but after the river reaches a point known as Gravelly Ford, about 27 miles west of Friant, the banks become relatively low. In a state of nature and during periods of high or flood water, the river flowed out of its banks at places below this point and over and upon certain of the land on either side of the river, either di-

rectly or after flowing into sloughs or branch channels. Certain of the lands so overflowed were moistened, enriched, and fertilized by the overflow and, as a result, produced increased amounts of beneficial vegetation, except in the case of infrequent floods of unusual extent.

In the area of such overflow, the river flowed through numerous side channels, branch channels, reaches of backwater, and sloughs, in addition to the main channel, such extra channels being referred to generally as "sloughs." Some of the sloughs form networks; some have dead ends; some receive only backwater, and some receive water from the river and return it to the river at lower points, either directly or through connecting sloughs. Some sloughs branch off other sloughs. Some carry river water whenever there is water in the main channel; others carry river water only at higher river stages.

6. In the vicinity of the lands described in plaintiffs' petitions, the San Joaquin River, in a state of nature and at the lowest stages of flow, was confined by natural banks to a sandy channel between lands which were granted to the State of California as swamp and overflow lands under the Swamp Land Act of September 28, 1850, ch. 84, 9 Stat. 519. This channel, except during stages of higher flow, hereinafter described, contained the water flowing in the river and is referred to as the "low channel."

Within a few years after the passage of that act, the lines segregating such swamp and overflow lands from the adjoining higher lands were surveyed and platted by the United States. In substance, the surveyed line of segregation marked certain natural banks at various distances from the low channel banks of the river. At higher stages of the river in every year of ordinary flow, the waters spread over the swamp and overflow lands, and for a time were confined to a wider channel by such
268 natural banks, which were substantially the outer boundaries of the lands granted as swamp and overflow. This wider channel is referred to as the "high channel."

In every year of ordinary flow in a state of nature the river rose still higher, so that its waters were no longer confined to the high channel. The waters so overflowing the high channel banks and into and over the upland area moved slowly in the same general direction as the flow of the river in the low and high channels. This wide overflow was confined by rising ground on each side of the general overflow basin of the river. This is referred to as the "overflow channel."

The flood plain described in this and the preceding finding extends approximately from Gravelly Ford to a short

distance below the confluence of the San Joaquin with the Merced River.

The natural flow of the river has been and is variable in quantity, both over the years and in periods within the years. In the spring and summer the river is fed by the melting snow pack of the Sierra Nevada Mountains and in the winter season by rainfall, supplemented by a small amount of snow-melt in the lower reaches of the mountains. As a result there have been two periods of high water, the winter rain flood usually in December, January, and February, and the spring and summer snow-melt overflow usually in April, May, and June, with considerable variance in the times of commencement, duration, and the times of peak flow.

7. The lands described in the petitions of the respective plaintiffs border on the main channel.

PRIOR RIGHTS

8. On November 14, 1927, the Stevinson Corporation, as the second party and the East Side Canal & Irrigation Company, as the first party, entered into an agreement with Southern California Edison Company, Ltd., as the third party, which reads in part:

> • • • the said party of the first part and the said party of the second part hereby convey to said
269 party of the third part, its successors and assigns, forever, the right to take, divert, store and use the waters of the said San Joaquin River and its tributaries and branches entering said river above Herndon, Fresno County, California, at such points and places thereon above Herndon as may be desired by the party of the third part, and in such amounts and in such manner as may be desired by said party of the third part, and for use in such reservoirs, tunnels, conduits, power houses and other works as said party of the third part may desire to use same for the purpose of producing hydro-electric power, and incidentally for domestic purposes necessary in connection with the construction and operation of such works; and said party of the first part and said party of the second part hereby convey to the party of the third part, its successors and assigns forever, an easement in the canals and works of the party of the first part and in the lands now owned by the party of the second part described herein, entitling said party of the third part to so take, divert, use and store said water as against the canal of the party of the first part and the land of the party of the second part and as against the party of the first part and the party of the second part as the owners thereof, or otherwise; the

land so claimed by party of the second part being more particularly described in Schedule "A" attached hereto; but the easement hereby conveyed shall be in and to the said land and any other land now owned by the party of the second part, and in any right which the party of the first part or the party of the second part may now have in or to the waters of said river; the right and easement hereby granted to the party of the third part being subject to the sole condition that the waters so taken, diverted, stored and used by the party of the third part for the production of hydro-electric power shall be, after such use, returned to the San Joaquin River at some points or placed thereon above Herndon, in Fresno County, California, without further claim thereto by the party of the third part as against the parties of the first and second parts.

* * * * * * *

Nothing herein contained shall be construed as an extinguishment, abandonment or waiver of the riparian rights of the party of the second part or as a conveyance of its riparian rights, or as otherwise affecting the said rights in any respect whatsoever, except as to and in favor of the party of the third
270 part, its successors and assigns, for use as herein provided, and nothing herein contained shall be construed as interfering with or affecting the right of the party of the first part or the party of the second part to take and enjoy or use any of the water of the said river and its branches and tributaries not so taken, diverted or used by the party of the third part in pursuance of the license, privilege and easement hereby granted to the party of the third part, and nothing herein contained shall be construed to affect any right which the party of the first part or the party of the second part may have to take, divert and use any water of said river, its branches and tributaries, subject to the rights hereby granted to the party of the third part, and said party of the second part hereby expressly preserves and retains its riparian rights, and party of the first part hereby expressly preserves and retains its water rights in all respects as against all parties other than the party of the third part, its successors or assigns.

The lands involved in these cases are among those described in Schedule A attached to the agreement.

9. During the period from 1895 to 1928, Southern California Edison Company Ltd. and San Joaquin Light and Power Corporation, or their predecessors, constructed

dams and reservoirs in the San Joaquin River basin above Friant and stored water in the reservoirs and released and regulated the flow of the waters through a series of power plants. Beginning in 1906, Miller & Lux Incorporated, a corporation, and its subsidiaries entered into numerous contracts with the two power companies, or their predecessors, by the terms of which it was agreed generally that, subject to certain limitations as to times and quantities, the two companies might store waters of the San Joaquin River System during comparatively high stages of the flow, and use the stored water for the production of power and return it to the river above the lands owned by Miller & Lux Incorporated during lower stages of the flow.

The effect of such operations has been to reduce the amount of the flow in periods of high water and to increase the amount of the flow during periods of low water. As new reservoirs were put into operation during these years, the regimen of the river below Friant was materially and progressively altered.

10. At the respective times here involved, San
271 Joaquin & Kings River Canal & Irrigation Company, Gravelly Ford Canal Company, Columbia Canal Company, Firebaugh Canal Company (formerly Panoche Canal Company), and San Luis Canal Company were corporations subsidiary to Miller & Lux Incorporated, which owned all or a majority of the stocks of each of such subsidiaries and had the controlling interest in each of them.

Prior to any of the times here involved, such subsidiary corporations, with the consent of and under agreements with Miller & Lux Incorporated, constructed certain canals and works and thereby diverted and appropriated large quantities of the water of the San Joaquin River for the irrigation of lands riparian to the San Joaquin River owned by Miller & Lux Incorporated, and also for the irrigation of lands non-riparian to the San Joaquin River owned by Miller & Lux Incorporated and by other persons.

Also prior to any of the times here involved and in addition to the foregoing diversions, Miller & Lux Incorporated constructed certain canals and works and thereby diverted and appropriated waters of the San Joaquin River for the irrigation of lands owned by it, both riparian and non-riparian to the San Joaquin River.

11. Prior to January 21, 1929, there were pending certain lawsuits between Miller & Lux Incorporated and its subsidiaries, on the one hand, and the Stevinson Corporation, on the other. On that day in order to settle those lawsuits, to confirm in Miller & Lux Incorporated and its

subsidiaries certain appropriative or prescriptive rights asserted by them, and to confirm in Miller & Lux Incorporated the right to use certain water released from storage by San Joaquin Light and Power Corporation and Southern California Edison Company, Ltd., Miller & Lux Incorporated and its subsidiaries and the Stevinson Corporation entered into a written agreement which reads in part:

"1. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto Second Party [San Joaquin & Kings River Canal & Irrigation Company] its successors and assigns forever, an easement in the said lands now owned by First Party described herein, entitling Second Party to take, use and divert above the intake of the East Side Canal & Irrigation Company in Township Nine (9)
272 South, Range Twelve (12), East, M. D. B. & M., a continuous flow of thirteen hundred and sixty (1360) cubic feet of water per second of the San Joaquin River, to either riparian or non-riparian lands and wherever situated, as against the land of First Party and as against First Party as the owner thereof, or otherwise, the land so owned by First Party being more particularly described in Schedule "A" attached hereto and made a part hereof by reference. The requirement that said water shall be taken, used and diverted above the intake of the East Side Canal shall not be deemed a limitation on the place of use of the water when taken from the river, but means only the point above which the water must be diverted from said river.

"2. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto the Firebaugh Canal Company, a corporation, and to Miller & Lux Incorporated, a corporation, their successors and assigns forever, an easement in all of the lands owned by First Party and described in said Schedule "A", entitling said Firebaugh Canal Company and said Miller & Lux Incorporated, their successors and assigns forever, to take and divert above the said intake of the East Side Canal & Irrigation Company and use sufficient water of said river, if the same be there flowing, as against said land and First Party as the owner thereof, or otherwise, for the irrigation of forty-five thousand (45,000) acres of the land described in Schedule "B" annexed hereto and made a part hereof by reference, with the right to substitute other land in lieu thereof in the same general area.

3. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto the San Luis Canal Company, Columbia Canal Company, Gravelly Ford Canal Company, and Miller & Lux Incorporated, their and each of their successors and assigns forever, an easement in the land owned by the First Party and described in said Schedule "A", entitling said San Luis Canal Company, said Columbia Canal Company, said Gravelly Ford Canal Company and said Miller & Lux Incorporated, and each of them, to take, divert and use the water of said river as against the land of First Party, and as against First Party as the owner thereof, or otherwise, to the extent that the water has been historically diverted by said Companies, with the right to change the place of use of said water, whether within or without the water-
273 shed, as desired by said canal companies and by Miller & Lux Incorporated, or either of them, their and or each of their successors and assigns.

4. First Party [Stevinson] by these presents does grant, bargain, sell, convey and confirm unto Miller & Lux Incorporated, a corporation, its successors and assigns forever, an easement in its land entitling said Miller & Lux Incorporated to take, divert and use all the water of said river stored by said San Joaquin Light & Power Corporation and said Southern California Edison Company, and thereafter released from such storage, as against the land of First Party described in said Schedule "A", and First Party as the owner thereof, or otherwise; and First Party hereby confirms the claim of Miller & Lux Incorporated to the full and complete title to said released water, and waives any claim thereto;

. . . . . .

5. In all cases where an easement is conveyed in the lands of First Party, [Stevinson] said easement shall be in and to the said land described in said Schedule "A" and any other land now owned by First Party, and in any right which First Party may now have in or to the waters of said river; and nothing herein contained shall be construed as an extinguishment, abandonment or waiver of the riparian rights of First Party, or as a conveyance of its riparian rights, or as otherwise affecting the said rights in any respect whatsoever, except as to and in favor of the parties herein mentioned, their successors and assigns; and nothing herein contained shall be construed as interfering with or affecting the right of First Party to take and enjoy or use any of the

water of the said river and its branches and tributaries, not so taken, diverted or used by the parties hereto to whom easements are hereby granted by First Party; and First Party hereby expressly preserves and retains its riparian rights in all respects as against all parties other than the parties hereto expressly granted easements hereby.

12. Certain other appropriative or prescriptive rights to water of the San Joaquin River were acquired by persons other than plaintiffs, and plaintiffs concede that, in addition to the rights of the two power companies and of Miller & Lux Incorporated and its subsidiaries in relation to stored water, the following appropriative or prescriptive rights to the use of the water of the San Joaquin River are superior and prior to the riparian rights of plaintiffs herein:

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Name	Maximum cubic feet per second	Yearly maximum acre-feet
Miller & Lux Incorporated and certain of its subsidiaries:		
Aliso Canal (diverted from head of Aliso Slough)	302	59,784
Chowchilla Canal (diverted from Lone Willow Slough)	120	49,300
Columbia Canal (diverted through Lone Willow and Brown Sloughs)	150	45,374
Lone Willow Slough, Aliso Slough, Brown Slough (diverted through various weirs, dams, levees and other works)	313	61,907
Temple Slough	463	157,296
San Joaquin Canal (diverted by Miller & Lux through canals of San Joaquin & Kings River Canal & Irrigation Company)	285	128,294
Mowry Slough (Little San Joaquin)	26	5,218
Borland Ranch	14	7,580
Pick Anderson Slough (diverted by canals taking out of Pick Anderson Slough and by dams and levees in and along said slough and its branches)	98	17,000
Orestimba Grant (diverted through Poso, Temple, Santa Rita, Pick Anderson and other sloughs by weirs, dams and levees in and along said sloughs)	264	52,264
San Joaquin & Kings River Canal & Irrigation Company, Incorporated right (Main, outside & Helm Canals and Helm Ditch)	1,360	512,730
San Luis Canal Company right (Helm Canal)	540	170,388
Gravelly Ford Canal Company	600	39,314
Firebaugh Canal Company	300	68,025
James and Tranquility Irrigation Districts		29,300
Blythe Canal		11,600
Edison Securities Companies		6,100
Other lands irrigated from waters taken from the San Joaquin River between Friant Dam and the head works of the Gravelly Ford Canal		30,464
		1,458,538

[1] Estimated.

The appropriative and prescriptive rights confirmed in Miller & Lux Incorporated and its subsidiaries by the agreement quoted in finding 11 are included in the above tabulation.

A cubic foot per second, also called a second-foot, is the rate of discharge flowing in a channel of a rectangular cross-section one foot wide and one foot deep at an average velocity of one foot per second. Water flowing at the rate of one cubic foot per second for 24 hours will produce a volume of water equal to approximately 2 feet in depth covering one acre or two acre-feet.

THE WATER SUPPLY AND THE SURPLUS AVAILABLE TO PLAINTIFFS

13. Among other factors, the extent and the value of the riparian rights of the lands described in the petitions of plaintiffs herein depend upon the quantity of water which reasonably may be expected to become available for use on such lands in times subsequent to the time of such valuation.

Because of the substantial variation from year to year and from month to month in the quantity of water dis-
275 charged by the river, the amount of water which may be discharged in any future month, year, decade, or score of years cannot be predicted with any assurance of approximate accuracy. It is, however, customary to use the record of past discharges for the purpose of making estimates of the future discharge of streams.

14. In 57 of the 68 water years between 1879 to 1946, both inclusive, in which the discharge of water is computed from measurements, the average yearly discharge was 1,811,082 acre-feet.

15. In any year here involved, owners of appropriative or prescriptive rights below Friant Dam and upstream from plaintiffs were and are entitled to the use of a maximum of 1,458,538 acre-feet of water (finding 12). Deducting the amount of the prior appropriative or prescriptive rights from the average yearly discharge of 1,811,082 would give an average yearly surplus of 352,544 available for use on lands having riparian rights. The records of water actually diverted show that the prior appropriators, in the aggregate, do not divert and put to use as much water as authorized by the rights listed in finding 12. In the period 1932-1944, inclusive, the highest aggregate diversion was 1,020,516 acre-feet, and the yearly average diversion 870,940 acre-feet.

Actually, there were few years when the discharge was approximately that of the yearly average. In many years the excess over the yearly average ran high and in many years the deficiency dropped low. In some of the low years,

the discharge was less than the aggregate of maximum diversion to which prior appropriators were entitled.

16. Yearly discharges varied in volume from a high of 5,211,000 acre-feet in 1886 to a low of 507,000 acre-feet for the year 1924. By ten-year periods, the average yearly discharge was as follows:

Years:	*Yearly average in acre-feet*
1937-1946, inclusive	2,030,300
1927-1936, inclusive	1,286,200
1917-1926, inclusive	1,463,700
1907-1916, inclusive	2,210,044
1897-1906, inclusive	1,799,157
1887-1896, inclusive (estimated)	1,952,870
1879-1886, inclusive (8 years)	2,476,125

276 During each of such ten-year periods, the discharges for separate years varied widely.

17. As the flows actually occurred, there were times of the year when, as a matter of right, the owners of appropriative and prescriptive rights, without reaching or exceeding their maximum limits in cubic feet per second, diverted substantially all the water of the stream, leaving no surplus for downstream riparian owners. At other times, the discharge exceeded the capacity of the diversion works of such appropriators and their requirements for use, as well as exceeding the maximum limit in cubic feet per second under their rights. At such times a surplus flowed down the river to become available for use by riparian owners.

The discharge is not uniform throughout a year, nor do the relative discharges for the months within the year remain constant. The highest monthly discharge during the year usually occurs in May or June, although occasionally it occurs in April or August. The yearly cycle, with its variability, is illustrated by the following table showing the percentage of the yearly total discharged each month:

Month	Monthly percentage for the year 1945	Average monthly percentage for the period 1905-45, inclusive
January	3.116	4.123
February	8.581	5.326
March	7.642	7.543
April	12.242	11.074
May	15.045	16.356
June	12.561	15.703
July	11.149	25.356
August	8.451	4.414
September	6.085	2.757
October	5.370	2.389
November	4.621	2.116
December	5.137	2.843

18. During the irrigating season each year, when the discharge has dropped below the amount required to satisfy the appropriative or prescriptive rights upstream from plaintiffs, and such prior rights take all the water of the river, the final downstream diversion is made at the head of Temple Slough, where a temporary dam, referred to as "Sack Dam," is placed across the river. A chart showing the dates when the dam was put into operation each
277 year for the period 1926-1945 is in evidence. The times the dam was put into operation corresponded with the times following the peak of the spring flood, when the discharge decreased to a point where it became necessary to take the whole flow for the use of the prior appropriative and prescriptive rights.

The period shown by such chart included some years of exceptionally high and some years of exceptionally low discharges, as well as several years in which the discharge approximated the long-time yearly average. In the absence of a complete record of the dates on which Sack Dam was annually installed, the chart for this period is accepted as indicating the times the dam was installed in other years under approximately similar discharge conditions.

19. Not taking into consideration temporary installations or unsubstantial interruptions in maintenance, Sack Dam was installed at the following times in the twenty-year period 1926-1945, inclusive, and all water of the San Joaquin River flowing at the site thereof was diverted from the river for the remainder of the irrigating season (except for an immaterial amount of seepage and a small quantity permitted to pass through a fish weir in the years 1944 and 1945):

Period during which dam installed:	*Number of years out of 20 the dam was installed in the period specified*
Between February 1-15, inclusive	1
Between March 1-15, inclusive	3
Between March 16-31, inclusive	1
Between May 16-31, inclusive	1
Between June 16-30, inclusive	2
Between July 1-15, inclusive	6
Between July 16-31, inclusive	2
Between August 1-15, inclusive	3
Between August 16-31, inclusive	1

Comparison of these dates with the records of annual discharges show that, in general, the higher the average annual discharges of the river, the later in the year was Sack Dam installed.

20. The records of diversions also show that there is a period in every year, usually commencing in October, November, or December, when Sack Dam is discontinued for the water year. Such period of open flow ends the next summer when there is no longer an excess of water
278 over the requirements of the prior appropriative and prescriptive rights, and Sack Dam is reinstalled. Generally, this open period commences just prior to the winter rains, when the discharge of the river is relatively low, but the demand for water is even lower. The excess of supply over demand continues through the rising volume of discharge caused by the winter and spring floods. It continues through the peak of the spring floods and is cut off by the installation of Sack Dam as the high discharges from the spring floods begin to subside. It is only during this period that water is available for use under downstream riparian rights.

However, the downstream riparian lands are not irrigated by such water throughout the whole period of such surplus, but only during a relatively short period at the peak of the spring floods, except in years of exceptionally low water, when the spring floods flow over and upon the grasslands described in the petitions of plaintiffs and moisten and enrich them, as hereinafter stated, and benefit and increase the growth of grass and other forage.

During the whole period in which a surplus passes the site of Sack Dam, water of the river becomes available to riparian owners for domestic use and for the purpose of watering livestock, but it is not satisfactorily established that such uses contribute substantially to the value of the riparian rights. The only substantial benefit is that derived from the moistening and enrichment of the soil by flooding during the relatively short period in which the spring flood reaches such proportions that the lands described in plaintiffs' petitions are overflowed.

Such flood water, which moistens and enriches the grasslands referred to, is a part of the natural flow of the river and is not water stored by the San Joaquin Light & Power Company or Southern California Edison Company, Ltd., and thereafter released from storage.

As the water flows over the lands of plaintiffs, some of it is absorbed, but the larger part flows on and eventually discharges into Suisan Bay and is not utilized for irrigation. Its flow into the Bay has some effect in repelling the encroachment of salt water into cultivated and cultivable lands on the delta and thus maintaining the usefulness for agricultural purposes. There is no evidence making an exact

279 or approximate evaluation of the use of such surplus water for this purpose.

21. Grasslands in the vicinity and of the kind here involved can utilize approximately 3 acre-feet per acre per year with maximum benefit. The use of less water per acre is beneficial but to a less degree. The use of more water per acre is detrimental.

The quantity of water per acre applied to the irrigation of controlled crop and grasslands is capable of determination with relative accuracy, since the flow can be controlled, measurements can be taken in regulated diversion and distribution works and the amount of waste computed. However, the quantity of flood water beneficially utilized on uncontrolled grasslands cannot be so measured. After a few hours of flooding, the soil becomes saturated and can absorb no more water. Any additional water flows away, returns eventually to the river, and is lost so far as the flooded land is concerned. The amount of water absorbed depends upon factors which may differ at relatively short distances, among which factors are the depth and the character of material which constitutes the soil. The amount of such absorption, however, is probably under one acre-foot per acre from one flooding. Notwithstanding lack of means to measure the absorption, the flood waters in fact promote the growth of grass and other forage, and the market value of the land with and without the benefit of such growth can be determined.

22. The right of a riparian landowner to the use of water from a stream is not absolute, but must be correlated with similar rights of other riparian owners. There are in the flood plain of the river, described in findings 5 and 6, a large number of riparian uncontrolled grasslands, including that described in the petitions of plaintiffs, which lands are entitled to share in the petitions of plaintiffs, which lands are entitled to share in the surplus water after prior appropriative and prescriptive rights have been satisfied. Downstream from the flood plain here involved are other riparian lands and also some streams flowing into the San Joaquin River from the east side. The quantity, extent, claims, and adaptability of such lands to irrigation are not disclosed by the evidence.

280 The utilization of the surplus flood waters by such downstream lands is not shown, but the larger part of the flood waters, supplemented by accretions from east side streams, passes these lands without being diverted or utilized. The only plan for utilization of such flood waters disclosed by the record is that of defendant, hereinafter de-

scribed, the diversions under which plan will not serve such riparian owners downstream. There is no evidence of past use by, or of any plan for the future benefit of, the downstream riparian owners, which is impeded or diminished by the customary flooding of plaintiffs' lands as herein stated.

DEFENDANT'S PLAN FOR UTILIZATION OF THE WATER

23. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, Fresno, Tulare, Kings, and Kern in the State of California.

Such plan contemplated, among other things, the construction of a dam across the San Joaquin River at Friant, forming a reservoir. It contemplated the construction of two canals, one with a capacity of 1,000 cubic feet per second, referred to later as the Madera Canal, reaching north from the reservoir to the counties of Madera and Merced, and another, with a capacity of 3,500 cubic feet per second, referred to later as the Friant-Kern Canal, reaching south from the reservoir to the counties of Fresno, Tulare, Kings, and Kern. Except for occasional spills to provide reserve storage capacity for the purpose of flood control, the reservoir and canals were planned with capacity to store and divert substantially all the water customarily flowing in the San Joaquin River at Friant. The plan contemplated that the United States would acquire all existing rights to the use, diversion, and storage of the waters of the San Joaquin River flowing at Friant.

24. The plan was duly approved by the President of the United States on December 2, 1935, such plan being set forth in a letter dated November 26, 1935, from the Secretary of the Interior to the President, which reads in part:

• • • • •

281 *General Description of Project*

The Central Valley project embodies a plan for the conservation, regulation, distribution, and utilization of the water resources of the Sacramento and San Joaquin Rivers to provide urgently needed water supplies for existing agricultural, industrial, and municipal developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of

commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt-hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal, and industrial use along the main river and in the fertile delta region of the Sacramento and San Joaquin Rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition, water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles, lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

The cost of the project, estimated at $170,000,000, will be met by revenues from the sale of water and power.

Water Supply

The sources of water supply for the project are the Sacramento and San Joaquin Rivers and their tributaries. The State of California, pursuant to acts of the State Legislature, has filed notices of appropriation on the principal streams, which are in good standing.

Water supplies studies made by the Department of Public Works of California, U. S. War Department, and the U. S. Bureau of Reclamation, indicate on the basis of available data that the works of the project will provide an adequate water supply for all purposes.

Engineering Features

The principal engineering features of the project are as follows:

Kennett Dam Unit.—The Kennett Reservoir, the key unit of the project, is located in the Sacramento River near Redding in Shasta County. The dam will be 420 feet high and store 3,000,000 acre-feet of water. A 175,000 k. v. a. power plant will be located below the dam. A reregulating afterbay with a 50,000 k. v. a. power plant will be constructed below the Kennett Dam. From the power plants a 200-mile power transmission line will extend to a main distributing substation near Antioch on Suisan Bay.

Contra Costa Conduit.—A canal, capacity 120 second-feet, with pumping plants, will extend westerly from the San Joaquin delta for 50 miles through Contra Costa County to supply municipal, industrial, and agricultural water requirements.

San Joaquin Pumping System.—The works for this pumping system will comprise a dam and other works in Sacramento delta to divert stored water from Kennett Reservoir through a channel into San Joaquin delta for salinity control, irrigation, and other purposes; dredging of existing channels in the San Joaquin delta; five dams and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley which will deliver water to Mendota weir on San Joaquin River, elevation 160 feet. These works
283 will be capable of furnishing a substituted supply of 1,000,000 acre-feet to 285,000 acres of land now irrigated from San Joaquin River.

Friant Reservoir.—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights on the San Joaquin River.

Friant-Kern Canal.—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal.—The Madera Canal, maximum capacity 1,500 second-feet, will extend from Friant Reservoir to Chowchilla River, a distance of 35 miles and will be capable of furnishing irrigation water to an area of 140,000 acres.

Estimated Cost of Project.

Kennett Dam, Reservoir and power plants	$ 84,000,000
Kennett transmission line and substation	14,000,000
Contra Costa Conduit	2,500,000
San Joaquin Pumping System	19,000,000
Friant Dam and Reservoir	14,000,000
Friant-Kern Canal	26,000,000
Madera Canal	3,000,000
Rights of way, water rights, and general expense	8,000,000
Total	[1]170,000,000

[1] So in the original.

Part of the water supply is to be obtained by the purchase of water now used for the irrigation of pasture lands and this will result in the retirement from use of 250,000 acres of submarginal land, as compared to a small and gradual increase of irrigated land.

25. The plan has been altered in a number of respects since it was approved by the President. Among other things, the height of the Friant Dam has been increased from 250 feet to 320 feet, enlarging the storage capacity from 400,000 acre-feet to 520,000 acre-feet. The pro-
284 posed pumping system, which would have conveyed Sacramento River water up the bed of the San Joaquin River by means of natural and artificial channels and works in a series ending at the mouth of the Merced River, has been supplanted by another which will pump Sacramento River water from the Delta into the proposed Delta-Mendota Canal, to be carried thence by gravity south to Mendota. The planned capacity of the Friant-Kern Canal has been increased from 3,500 to 4,000 cubic feet per second. Due primarily to the exigencies of the second World War, substantial portions of the project are not yet completed. Friant Dam still is without the drum gates for the spillways at the top and, until such gates are installed, the dam will impound approximately 100,000 acre-feet of water less than the planned storage. Friant-Kern Canal is under construction, but has not been completed.

26. Defendant's plan, as modified, contemplated that the United States should eventually store and divert to non-

riparian use all the waters of the San Joaquin River flowing at Friant, except for occasional spills. Such spilling was not for the purpose of supplying water to irrigate riparian uncontrolled grasslands, but was contemplated for the purpose of reserving vacant storage space in the reservoirs in the exercise of flood control. Such spilling would not provide an adequate or dependable substitute for the spring floods in the irrigation of riparian uncontrolled grasslands.

The plan contemplated that defendant should acquire all existing rights to the use of the water flowing past Friant. Such rights were of three classes: (1) Use of the water for production of cultivated crops; (2) use of the water for irrigation of controlled grasslands; and (3) the riparian right to the flow of the river, subject to prior rights for the above purposes, for the irrigation of riparian uncontrolled grasslands, watering of livestock, and domestic purposes.

Defendant's plan contemplated that compensation for the acquisition of the right to the use of water on croplands would be made by providing a substitute supply of water from the Sacramento River through the pumping system. Pending the construction and completion of the pumping system, the plan contemplated that sufficient water
285 would be released from the Friant Reservoir to meet the requirements of the cropland rights.

The plan contemplated that the grassland rights and the riparian rights were to be purchased or otherwise acquired by the defendant, and the riparian rights extinguished.

27. With some modification, defendant's original plan has continued as the plan of defendant, and it has proceeded to carry it out by engaging in the construction of the dam at Friant and the Madera and the Friant-Kern canals, as well as certain other branches of the project.

To finance such work Congress has appropriated large sums of money by the following described acts:

June 22, 1936, c. 689, 49 Stat. 1597, 1622	$ 6,900,000
August 9, 1937, c. 570, 50 Stat. 564, 597	12,500,000
August 26, 1937, c. 832, 50 Stat. 844, 850	12,000,000
May 9, 1938, c. 187, 52 Stat. 291, 324	9,000,000
May 10, 1939, c. 119, 53 Stat. 685, 719	10,000,000
April 6, 1940, c. 77, 54 Stat. 82, 87	5,000,000
June 18, 1940, c. 395, 54 Stat. 406, 438	23,600,000
June 28, 1941, c. 259, 55 Stat. 303, 336	34,750,000

The act of October 17, 1940 (c. 895, 54 Stat. 1198, 1200), reauthorized the project, and the act of July 30, 1941 (c. 334, 55 Stat. 612), in aid of the construction of the project, provided for acquisition of Indian lands embraced therein.

(a) *Purchase of the prior rights of Miller & Lux Incorporated and agreement for exchange of water.*

28. Promptly after the approval of the plan, defendant proceeded to ascertain the extent of the controlled grassland and the riparian water rights and the compensation to be paid therefor. On July 27, 1939, the defendant and Miller & Lux Incorporated and its subsidiaries entered into a written contract whereby Miller & Lux Incorporated and its subsidiaries agreed to relinquish or convey to defendant all their rights to the use of water of the San Joaquin River, except and in excess of specified rates of flow deemed to be equivalent in quantity to their existing water supply under rights for the irrigation of croplands.

286 29. The rates of flow specified in such contract as being reserved by Miller & Lux Incorporated were mean daily flows in cubic feet per second as follows:

During the month of—	*Number of cubic feet per second, plus the Chowchilla Canal right*
January	400
February	535
March	1,310
April	1,950
May	2,285
June	2,450
July	2,475
August	2,210
September	1,335
Octo er	660
November	485
December	400

The Chowchilla Canal right varies according to the flow, the maximum per year being estimated at 49,300 acre-feet (finding 12).

Computing on the basis of 2 acre-feet per day for one second-foot of flow and estimating the Chowchilla Canal right at 49,300 acre-feet, the yearly aggregate reserved by Miller & Lux Incorporated, and its subsidiaries, is 1,056,340 acre-feet.

30. On the same day that Miller & Lux Incorporated and its subsidiaries and the defendant made the agreement for the sale and purchase of the controlled grassland and riparian rights, they entered into a further agreement, referred to as the "contract for exchange of waters." This agreement provided in detail for the release of water from Friant Reservoir and for the delivery of substitute water through the Delta-Mendota Canal when that system would become operative.

On September 14, 1939, Miller & Lux Incorporated and Gravelly Ford Canal Company made, executed, and delivered to defendant a conveyance of the rights described in the agreement dated July 27, 1939.

(b) *Construction of works and impounding of water*

31. Friant Dam is a straight gravity concrete dam. Its total length at the top is 3,430 feet and the maximum
287 height is 320 feet. Across the top of the dam is a roadway whose elevation above mean sea level is 583 feet. Unless otherwise mentioned, all the elevations given in connection with the openings hereinafter mentioned are the elevations at the upstream face of the dam and relate to mean sea level.

The only openings extending entirely through the dam are those hereinafter mentioned. The first is the spillway at the top of the dam which is designed to be controlled by three drum gates. These drum gates when installed will be large steel cylinders, each 100 feet long and 18 feet in diameter, which will float up and down in a chamber at the bottom of the spillway opening and will be raised and lowered by the water let into and released from the chamber. By increasing the amount of water in a chamber the gate will float up, closing, to the extent desired, the opening which the particular gate is to control. By reversing the process the gate will go down. It can be adjusted and held to any point. When the gates are raised to the designed maximum elevation, the maximum water surface will be at elevation 578. When the gates are completely lowered, the maximum water surface will be at elevation 560, except for the head required to flow the water over the spillway. The drum gates were intended to be installed in 1942, but due to the advent of war in 1941, progress in that connection was halted and the drum gates are not yet installed.

The next lower opening is the outlet to the Friant-Kern Canal at the south side of the dam. The center line of the outlet is at elevation 464.

The next lower opening is the outlet to the Madera Canal at the north side of the dam. The center line of the outlet is at elevation 446.

Next are four openings referred to as the permanent river outlets, all on the same level. The inverts, the lowest points in the cross sections of the openings, are at elevation 375.42.

The next were three temporary openings, used during construction to permit the water of the river to pass, but which were later filled with concrete. The floors of these openings were at elevation 316.

The normal low-water surface of the river prior to the construction of the dam was at elevation 305.6.

The following table sets out the elevations above sea
288 level and corresponding elevations above the normal low-water surface of the river at the site of the dam.

	Elevation in feet above mean sea level	Height in feet above normal low-water surface of river
Roadway on top of dam	583	277.4
Water surface with drum gates raised	578	272.4
Water surface without drum gates	560	254.4
Center line of outlet to the Friant-Kern Canal	464	158.4
Center line of outlet to the Madera Canal	446	140.4
Invert of river outlets	375.42	69.82
Floor of temporary construction openings	316	10.4
Normal low-water surface of river	305.6	0

32. The contract for the construction of the dam was awarded on October 9, 1939, and construction was commenced on November 3, 1939. In the early stages of construction, and prior to March 6, 1941, the water of the river was carried over the foundation of the dam in a wooden flume. The floor of the flume was 4.4 feet above the normal low water surface of the river. The amount of water impounded by reason of this difference in elevation is not disclosed. At one time while the flume was being used to pass the water, some high water exceeded the capacity of the flume, backed up behind the dam, and flooded the works. This flooding was not an intended consequence of the work, although a calculated risk.

33. The concrete work of the dam was divided into sections, referred to as blocks, numbered consecutively from one end of the dam to the other. As the concrete work progressed, three temporary openings, each 14 feet square, were left in the base of the dam through blocks 37, 39, and 41. The elevation of the floors of these openings at the upstream face was 10.4 feet above the normal low water surface of the river. When use of the wooden flume was discontinued and the river was diverted through these temporary openings, there was a permanent impounding of water immediately behind the dam to a depth of not less than 10.4 feet. The number of acre-feet impounded is not shown, but was negligible.

During the late summer or early fall of 1941, the water was cut off from the temporary opening in block 41 and was carried through the temporary openings in blocks 37 and 39. Steel gates, in the nature of a headworks struc-

289 ture, then were firmly installed at the upstream end of the temporary outlet through block 41. Next, steel gates were similarly installed in the temporary outlet through block 39. After the gates were installed and in good operating condition, all the water was passed through the gate-controlled openings through blocks 39 and 41, and the outlet through block 37 was completely filled with concrete and permanently sealed off against further passage of water.

As the natural flow decreased with the season, the outlet through block 39 was cut off, all the water was passed through the gate-controlled temporary opening through block 41, and the opening through block 39 was filled with concrete and permanently sealed. That left only the temporary opening through block 41 open and in operation.

34. Prior to October 20, 1941, the concrete work in the dam had been completed to above elevation 400, but not as high as the elevation of the designed outlet into the Madera Canal. On or about that day, the gates in the temporary outlet through block 41 were partially closed for the purpose of impounding water and at the same time allowing the passage of approximately the amount of water required to be released under the agreement of July 27, 1939, with Miller & Lux Incorporated and its subsidiaries. This operation raised the surface of the water in the reservoir until, on November 11, 1941, the water reached elevation 375.42 and commenced to spill through the permanent river outlets.

The water was then cut off from the temporary outlet through block 41 and the work of permanently sealing that outlet was begun. The sealing was completed in about five months. Except for the amount approximately equalling the quantities reserved by Miller & Lux Incorporated and its subsidiaries, no water passed the dam between October 20 and November 11, 1941.

When the water was cut off from the last temporary opening and the opening was sealed, the water below the inverts of the permanent river openings was permanently impounded, with no means left for its release. The amount so impounded was approximately 17,400 acre-feet.

35. The permanent river outlets were designed to be controlled by needle valves. Defendant had been taking steps preliminary to the purchase of the valves when the
290 international situation became so bad, and demands for materials for defense purposes became so great in the fall of 1941, that the valves could not be obtained. Except for the emergency and for the ensuing war, the valves to control the permanent river outlets would have been installed in the year 1942.

In the fall of 1941 the Madera Canal had been constructed to the extent of about 7 miles, but had not yet been completed. Construction of the Friant-Kern Canal had not been commenced.

For a short time in the winter of 1942, a high flow in the river caused more water to enter the reservoir than could be drained by the uncontrolled permanent river outlets and water was temporarily impounded to elevation 415. As the flow of the river dropped, the water impounded above the elevation of the permanent outlets drained through the uncontrolled permanent outlets into the river below the dam. At a time not disclosed by the evidence, temporary plugs were put into two of the permanent river outlets.

In 1943 valves for two of the permanent river outlets and for the Madera Canal outlet were borrowed from Boulder Dam and were installed. The first storage of water in the reservoir by means of closing or partially closing one of these valves was started on February 21, 1944.

36. The Madera Canal was completed in 1944. The surface level of the water in the reservoir was then raised sufficiently to divert a large quantity thereof through the Madera Canal, from which it was used to raise the general water table in the area served by the canal. Approximately 302,600 acre-feet of water was stored behind the dam at this stage of the operation. The flow of water through the dam was never completely stopped. For the six months after the needle valves were installed, the quantity of water released monthly was approximately that required under the agreement of July 27, 1939, between the defendant and Miller & Lux Incorporated and its subsidiaries. During and after September 1944 the releases were substantially larger than the requirements of such contract, except during the months of November and December 1944, when they were substantially equal to such requirements.

In 1945 by means of control at the permanent river outlets,
the reservoir was filled to the base of the openings for
291 the drum gates, creating a storage of approximately
430,000 acre-feet of water. The drum gates are not yet installed and for that reason the reservoir has not yet filled to its designed capacity.

OTHER SOURCES OF SUPPLY

37. Defendant contends that there are and will continue to be certain sources of water available to plaintiffs notwithstanding the construction of Friant Dam and the planned diversion of water through the Madera and Friant-Kern Canals.

When the Friant-Kern Canal is completed and the planned operation of the dam and the Madera and Friant-Kern Canals become fully effective, the amount of water from the east side streams combined with all other upstream inflows would not be sufficient to produce the amount of water required to overflow the lands of the plaintiffs hereinafter described.

THE CALIFORNIA CONSTITUTION

38. An amendment to the constitution of the State of California, Article XIV, Section 3, approved by the voters on November 6, 1928, reads:

> It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *Provided, however,* That nothing herein contained shall be construed as de-
292 priving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

The operation of the government's plan by means of control through Friant Dam and the Madera and Friant-Kern Canals, will conserve water of the river and will increase the acreage of crop land under irrigation. Water previously used for controlled grassland will be available for crop land. The equivalent of approximately one acre-foot

per acre per flood absorbed by the 82,000 acres of uncontrolled grassland will be available for crop lands and can be used, except for occasional spills, in seasons of low water supply. The portion of the flood waters which is not absorbed and which flows unchecked into Suisan Bay can be stored and used on crop lands.

There is some riparian use of the flood water downstream from the flood plain here involved, but the extent is not shown. The flood waters also help to repel the encroachment of salt water in the Delta area. There is no evidence from which the relative economic value of the control of the river under the government's plan can be approximately compared with that which would exist without such control. However, it is reasonable to infer from the evidence that the conservation and use of the water under the government's plan, while depriving riparian uncontrolled grasslands of flood water heretofore customarily utilized by them, will be a more reasonable and beneficial use in the interest of the people and for the public welfare.

NAVIGABILITY

39. The San Joaquin River is a navigable stream. Apart from the plan set forth in findings 23-27, inclusive, no evidence has been introduced proving or attempting to prove the effect of the completion and operation of Friant Dam and the diversion canals on the navigability of the San Joaquin River, except the evidence which shows that
293 when the project comes into full operation, substantially all the flow of the river will be stopped at Temple Slough for 36 out of 48 years. During the other 12 years the flow will be reduced to a small percentage of the flow which would have occurred in the absence of such dam and diversion works. No evidence has been introduced by either party as to what might be the effect of the reduced flow in connection with the deposit of silt in Stockton Harbor or in the channel between Stockton and Suisan Bay, or as to what might be the effect in the alteration of currents in such harbor and channels as such currents may relate to the safety of navigation, or as to what might be the effect in preventing recurrences of interruption of service on interstate railways and highway traffic by floods.

There is no dispute that the operation of the dam at Shasta will aid navigation of the Sacramento River.

CLAIM OF JAMES J. STEVINSON—NO. 46265

40. At all times here involved plaintiff James J. Stevinson, a corporation, was the owner in fee, in the possession

entitled to the possession of all those certain parcels nd situated in the County of Merced and the County tanislaus, State of California, described as follows:

Parcel 1—a portion of the Orestimba Rancho more particularly described as follows, to wit:

Commencing at the corner to Sections 3, 4, 9, and 10, in Township 7 South, Range 9 East, Mount Diablo Base and Meridian, and running thence South 36½° West, 11½ chains; thence North 21¾° West, 41 chains to Oak tree on bank of slough; thence South 60¼° West, 1.75 chains for place of beginning; thence with the true meridian magnetic variation 15°30′ East, North 25½° West 113.43 chains; thence North 38¼° East 51.42 chains to the left bank of the San Joaquin River; thence up said San Joaquin River with its meanderings South 58° East, 2.30 chains South 42¾° East, 1.70 chains, South 18¾° East, 5 chains; South 49° East, 5 chains; South 65° East, 6 chains; North 86½° East, 5.52 chains; North 72° East, 5 chains; North 69½° East, 9 chains; North 84° East, 9.50 chains; South 35° East, 10 chains; South ¾° East, 4.43 chains; South 11¾° West, 4 chains; South 20½° West, 3.96 chains; South 35½° West, 7 chains; North 89¼° West, 4.50 chains; South 67¾° West, 3.40 chains; South 39½° West, 7.26 chains; South 37½° East, 7.78 chains; South 47¾° East, 11 chains; South 17¾° East, 10.40 chains; South 52° West, 9.60 chains; South 79° West, 2.62 chains; South 86° West, 11.70 chains; South 77¾° West, 3.76 chains; South 56° West, 3 chains; South 41° West, 3.80 chains; South 12° East, 5 chains; South 37° East, 22.10 chains; South 5½° East, 6.25 chains; South 1½° West, 1.86 chains; South 13½° West, 2.50 chains; South 20° West, 4.25 chains; South 3½° West, 4.34 chains; South 9° West, 1.27 chains; South 20¼° East, 1.32 chains; South 21¾° East, 14.16 chains; thence leaving said South bank of San Joaquin River South 60¼° West, 19.75 chains, to place of beginning. Being portions of Sections 27, 28, 33, and 34 in Township 6 South, Range 9 East, and a part of Section 4 in Township 7 South, Range 9 East, containing 583.35 acres, more or less, being a part of the Orestimba Rancho.

Parcel 2—In Township 6 South, Range 9 East, Mount Diablo Base and Meridian, Northeast quarter of Southwest quarter of Southeast quarter, West half and Southeast quarter of Southwest quarter of Southeast quarter and Fractional Lot 3 in Section 16;

Fractional Lots 1, 2, 3 and 4 and Swamp and Overflowed Land Surveys Nos. 157 and 112, in Section 21; Fractional Lot 2 and Northwest quarter of Northwest quarter and portions of Swamp and Overflowed Land Surveys 155 and 160 in Section 27; Swamp and Overflowed Land Surveys Nos. 113, 160 and 155, Fractional Lots 1 and 2 in Section 28; portion of Swamp and Overflowed Land Survey No. 114 in Section 33, Fractional Lots Nos. 1, 2, 3, and 4, Swamp and Overflowed Land Surveys Nos. 156, 114 and 115 and East half, in Section 34; Fractional Lots 1 and 2, Northwest quarter of Southwest quarter, and Southwest quarter of Northwest quarter, in Section 35.

Parcel 3—In Township 7 South, Range 9 East, Mount Diablo Base and Meridian, Fractional Lots 1, 2, 3, 4, 5, 6 and 7, Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 67, 69 and 76 in Section 2; Fractional Lots 1, 2, 3, 4, 5, 6 and 7, West half of Northeast quarter, Swamp and Overflowed Land Surveys Nos. 85 and 67, in Section 3; Swamp and Overflowed Land Surveys Nos. 67, 330 and 236 in Section 10; Fractional Lots 1, 2, 3, 4 and 5, Northeast quarter of Northwest quarter, Northeast quarter, Swamp and Overflowed Land Surveys Nos. 330, 236, 232 (resurvey of 188), 235 (resurvey of 189), 380 and 281 and 282 in Section 11; Swamp and Overflowed Land Survey No. 232 in Section 12; Swamp and Overflowed Land Surveys Nos. 233 and 234, 385, 278, Fractional Lots 1, 2, 3 and 4 in Section 13 excepting the Easterly 40 acres of Lot 2 and the Easterly 20 acres of Lot 3; Swamp and Overflowed Land Surveys Nos. 233 and 234 in
295 Section 14; Swamp and Overflowed Land Survey No. 130 North of County Road and Fractional Lot 1 in Section 24.

Parcel 4—In Township 7 South, Range 10, East, Mount Diablo Base and Meridian, South half of Fractional Lot 1, Fractional Lot 2, and Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 19; all of Fractional Lot 2 in South half, Fractional Lots 3 and 4, Northeast quarter of Southeast quarter, and Swamp and Overflowed Land Surveys Nos. 128, 231 (resurvey of 131), in Section 20; Fractional Lots 1, 2, 3 and 4, and Swamp and Overflowed Land Survey Nos. 124 and 127 in Section 28; Fractional Lot 1 and Swamp and Overflowed Land Surveys Nos. 128 and 231 (resurvey of 131), in Section 29; Swamp and Overflowed Land Surveys Nos. 126 and 129 in Section 30.

41. All the above-described lands lie along and border upon the channels of the San Joaquin River and are riparian thereto. Each year up to and including 1941, with a few exceptions in years of extremely low water, substantially all of the lands described as Parcel No. 1 and the lands in the remaining parcels described as swamp and overflow lands were overflowed by spring floods and were thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941. When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of such lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, referred to in finding 30, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the land at that time.

42. Deducting 255 acres of land occupied by ponds and sloughs, such overflowed land aggregated approximately 2,797 acres. The difference between the fair market value of such 2,797 acres on or about October 20, 1941, with riparian rights to the use of the waters of the San
296 Joaquin River, and the fir market value without such riparian rights was $25,173.

43. Parcels Nos. 2, 3 and 4 lie on the east side of the San Joaquin River and consist of two general groups, namely, the swamp and overflow lands adjacent to the river, and the high land adjoining the swamp and overflow lands and not immediately adjacent to the river, except in its flood stages. The high land is generally susceptible of cultivation. It is not overflowed by the spring floods but plaintiff Stevinson Corporation contends it receives benefits from the yearly flooding of the San Joaquin River by reason of seepage. It is not satisfactorily proved that such high land has been so benefited.

Some of the high land, in quantities not ascertainable from the evidence, has in the past received some water from the East Side Canal, a canal which takes out of the San Joaquin River about 15 miles southeast of the lands involved in these cases. There is no satisfactory proof of the extent, the benefit, or the value to the land of San Joaquin River water which has been or may be conveyed by this means.

44. A portion of the overflowed lands, primarily those within Parcels Nos. 1 and 2, lies north of the Merced River. Defendant contends that the flow of the Merced River contributes to the flooding of the lands below the junction and, together with other inflows, provides an adequate water supply, notwithstanding any effect which may result from the completion of the Friant Dam and the Friant-Kern and Madera Canals.

During the period of spring floods, the greater part of the flow of the Merced River is diverted many miles upstream for irrigation purposes, and the flow which reaches the San Joaquin River, combined with other upstream inflows, would not be sufficient to flood plaintiff's lands when the Friant Dam and diversion canals come into full operation.

CLAIM OF ARCHIBALD J. STEVINSON—NO. 46331

45. On December 22, 1937, the Stevinson Corporation was and for a long time prior thereto had been the owner, entitled to possession, and in possession of the following described lands and premises:

297 Fractional Lots 1, 2, 3 and 4, and Swamp and Overflow Surveys Nos. 132 and 133, in Section 27, Township 7 South, Range 10 East, M. D. B. & M., containing 432.67 acres.

On that day, the Stevinson Corporation made, executed, and delivered to plaintiff Archibald J. Stevinson a deed whereby it granted and conveyed such lands and premises to Archibald J. Stevinson.

Each year up to and including 1941, with a few exceptions in years of extremely low water, that portion of such lands described as Swamp and Overflow Surveys Nos. 132 and 133, which contained approximately 185 acres, was overflowed by spring floods and was thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941.

The land in Lots 1, 2, 3, and 4 is generally susceptible of cultivation. It is not overflowed by the spring floods, but plaintiff Archibald J. Stevinson contends that it receives benefits from the yearly flooding by reason of seepage. It is not satisfactorily proved that such high land has been so benefited.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of such lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the land at that time.

46. The difference between the fair market value of such overflowed land on or about October 20, 1941, with riparian rights to the use of the waters of the San Joaquin River and the fair market value without such riparian rights was $1,665.00.

298 CLAIM OF 3-H SECURITIES COMPANY—NO. 46,332

47. On February 21, 1933, the Stevinson Corporation was and for a long time prior thereto had been the owner, entitled to possession, and in possession of that portion of Swamp and Overflow Land Survey No. 130 lying to the south and east of the road from Gustine to Merced. On that day the Stevinson Corporation made, executed, and delivered to 3-H Securities Company its deed whereby it granted and conveyed such land to the 3-H Securities Company.

48. Each year up to and including 1941, with a few exceptions in years of extremely low water, substantially all of such lands were overflowed by the spring floods, and were thereby moistened and enriched and the growth of vegetation for pasturage was thereby promoted. Such spring floods have continued to moisten and enrich such lands during the spring floods since 1941.

When the Friant-Kern Canal is completed, the planned operation of the dam and the Madera and Friant-Kern Canals will prevent the further overflowing of such lands by spring floods.

During the period October 21 to November 11, 1941, when all the water of the river at Friant was being impounded at the dam, except the amount required to meet the releases specified in the agreement of July 27, 1939, the river was at a low stage and the volume was less than the aggregate amounts to which prior appropriative and prescriptive rights were entitled. Had the impounding not occurred, the flow still would not have been sufficient to flood the land at that time.

49. The difference between the fair market value of the above-described lands on or about October 20, 1941, with riparian rights to the use of the waters of the San Joaquin

River and the fair market value without such riparian rights was $234.00.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows: in favor of plaintiff James J. Stevinson
299 in the sum of $25,173.00; in favor of plaintiff Archibald J. Stevinson in the sum of $1,665.00; and in favor of plaintiff 3-H Securities Company in the sum of $234.00. On each of the judgments in each case there will be added compensation for delay in payment, computed at four percent per annum from October 20, 1941, to date of payment.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff James J. Stevinson, in the sum of twenty-five thousand one hundred seventy-three dollars ($25,173.00); in favor of plaintiff Archibald J. Stevinson in the sum of one thousand six hundred sixty-five dollars ($1,665.00); and in favor of plaintiff 3-H Securities Company in the sum of two hundred thirty-four dollars ($234.00). There will be added to the amount of the judgment in each case compensation for delay in payment, computed at four (4) percent per annum from October 20, 1941, to date of payment.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue for just compensation for the taking of the water rights appurtenant to their lands on the San Joaquin River. They own lands riparian to the San Joaquin downstream from the lands of plaintiffs in *Gerlach Live Stock Company, et al.* v. *United States*, this day decided. Their riparian rights were unimpaired by any condition in their deeds or by any other agreement as in the cases in *Gerlach Live Stock Co., et al.*

The Commissioner has found that certain of plaintiffs' lands were benefited by the high waters of the San Joaquin River and certain lands were not. We concur in his findings.

For the reasons set out in *Gerlach Live Stock Company et al.* v. *United States*, we hold that these water rights were taken by defendant not later than October 20, 1941. Also for the reasons set out in *Gerlach Live Stock Company, et al.* v. *United States* we are of opinion that plaintiffs are entitled to recover therefor, and that the measure of just compensation is $9.00 per acre for the acreage benefited by

the high waters, plus compensation for delay in payment computed at 4 percent per annum from October 20, 1941, to the date of payment.

300 Judgment will be entered in favor of plaintiff James J. Stevinson in the sum of $25,173.00; in favor of plaintiff Archibald J. Stevinson in the sum of $1,665.00; and in favor of plaintiff 3-H Securities Company in the sum of $234.00. To each sum there is to be added compensation for delay in payment computed at 4 percent per annum from October 20, 1941, to date of payment. It is so ordered.

HOWELL, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Justice,* concur.

301 *Judgment of the Court—March 1, 1948.*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are entitled to recover as follows: in favor of plaintiff James J. Stevinson in the sum of $25,173.00; in favor of plaintiff Archibald J. Stevinson in the sum of $1,665.00; and in favor of plaintiff 3-H Securities Company in the sum of $234.00. On each of the judgments in each case there will be added compensation for delay in payment, computed at four percent per annum from October 20, 1941, to date of payment.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States as follows: in favor of plaintiff James J. Stevinson, in the sum of twenty-five thousand one hundred seventy-three dollars ($25,173.00); in favor of plaintiff Archibald J. Stevinson in the sum of one thousand six hundred sixty-five dollars ($1,665.00); and in favor of plaintiff 3-H Securities Company in the sum of two hundred thirty-four dollars ($234.00). There will be added to the amount of the judgment in each case compensation for delay in payment, computed at four (4) percent per annum from October 20, 1941, to date of payment.

302 *Proceedings after entry of judgment*

On May 4, 1948, on motion made therefor and allowed by the court, the defendant filed a motion for a new trial.

On June 1, 1948, the court entered the following order on said motion:

ORDER.

These cases come before the Court on Motions for New Trials by the parties and, on consideration thereof,

It is ordered, this first day of June, 1948, that said motions be, and the same are, overruled.

By the Court,
(s) Marvin Jones,
Chief Justice.

303 Clerk's Certificate to foregoing transcript omitted in printing.

305 Supreme Court of the United States
Nos. ....., October Term, 1948.

The United States, *Petitioner,*
vs.
James J. Stevinson, a corporation.

The United States, *Petitioner,*
vs.
Archibald J. Stevinson.

The United States, *Petitioner,*
vs.
3-H Securities Company.

Order Extending Time to File Petitions for Certiorari

Upon Consideration of the application of counsel for the petitioner,

It is Ordered that the time for filing petiton for writ or writs of certiorari in the above-entitled causes be, and the same is hereby, extended to and including Sept. 28, 1948.

Robert H. Jackson,
Associate Justice of the Supreme Court of the United States.

Dated this 20 day of August, 1948.

U. S. GOVERNMENT PRINTING OFFICE 801974 NO. 5....1949

Supreme Court of the United States

No. 299—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response of such writ.

Supreme Court of the United States

No. 300—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response of such writ.

Supreme Court of the United States

No. 301—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response of such writ.

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Supreme Court of the United States

No. 302—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 303—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 304—October Term, 1948

Order allowing certiorari

Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1949